Emory Law Journal

Volume 71 | Issue 4

2022

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Recommended Citation

Jason R. Chohonis, *Patching the Holes in SOX: FCPA Disgorgement after Liu and the NDAA*, 71 Emory L. J. 841 (2022).

Available at: https://scholarlycommons.law.emory.edu/elj/vol71/iss4/4

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PATCHING THE HOLES IN SOX: FCPA DISGORGEMENT AFTER *LIU* AND THE NDAA

ABSTRACT

The Foreign Corrupt Practices Act (FCPA) forbids companies and persons from bribing foreign officials to secure business and creates an affirmative duty for companies to maintain valid accounting records. Since 2004, following the passage of the Sarbanes-Oxley Act (SOX), the Securities and Exchange Commission (SEC) has pursued "equitable remedies" under 15 U.S.C. § 78u(d) to disgorge profits from those who have violated the FCPA. Despite apparent legislative acceptance of disgorgement, the Supreme Court put disgorgement's legality into doubt in two recent decisions. The first, Kokesh v. SEC *in 2017, established that disgorgement had to happen within a five-year statute of limitations period. The second,* Liu v. SEC *in 2020, held that disgorgement might not be allowed as an equitable remedy if, as in FCPA cases, the money disgorged was sent to the Treasury rather than wronged investors.*

At the close of 2020, Congress responded to these decisions. To preserve the powers of the SEC to protect U.S. financial markets, Congress passed legislation that expressly granted the SEC disgorgement powers and raised the statute of limitations to ten years for select securities law violations. Despite this new legislation, questions still exist as to whether the SEC must abide by the limitations on its disgorgement powers set out by the Liu *decision and which statute of limitations applies to FCPA disgorgement. This Comment argues that disgorgement under the newly revised Section 78u(d) should be allowed for FCPA actions that send money to the Treasury, regardless of whether the limitations imposed by the* Liu *decision still apply. Further, this Comment asserts that, in light of the uncertainty likely to arise from the new changes to Section 78u(d), Congress should revise the statute to expressly allow the SEC to disgorge profits to the Treasury in FCPA actions with a ten-year statute of limitations. Finally, this Comment argues that the best solution for concerns about the slow pace of SEC enforcement would be new legislation that allows for SEC self-funding derived from FCPA disgorgement remedies.*

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INTRODUCTION

From 2004 to 2007, banker Garth Peterson crossed ethical and legal lines.[1] Peterson, a fluent speaker of Mandarin[2] and head of the Shanghai branch of Morgan Stanley's global real estate office, "secretly bribed a [Chinese] government official to illegally win business for his employer."[3] Peterson insisted that his colleagues owed this official a favor because the official had "really gone out of his way" to help them get a deal over a competitor.[4] This act of bribery ultimately enriched Peterson to the tune of more than $1.8 million.[5] A large portion of these ill-gotten gains were in the form of a property interest in a luxury high-rise apartment building in Shanghai, which he jointly invested in with his corrupt foreign counterpart.[6] After his deception was discovered by the Securities and Exchange Commission (SEC), Peterson agreed to disgorge profits of over $250,000, as well as his interest in the property, worth over $3.4 million (referenced in this Comment as the Peterson case).[7]

Peterson faced civil, criminal, and—importantly for this Comment—equitable penalties because he violated the Foreign Corrupt Practices Act (FCPA).[8] Yet, had he committed those same actions today, he may have gained materially from his crimes at the cost of his competitors, his employer, and the rule of law as a result of the Supreme Court's recent holding in *Liu v. SEC*.[9] This 8-1 decision, which only partially upheld the SEC's ability to seek disgorgement,[10] threatened the ability of the SEC to bring disgorgement *at all* in

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1 Press Release, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud, SEC (Apr. 25, 2012) (available at https://www.sec.gov/news/press-release/2012-2012-78htm).

2 Aruna Viswanatha, *Former Morgan Stanley Star in China Pleads Guilty*, REUTERS (Apr. 25, 2012, 10:01 PM), https://www.reuters.com/article/uk-sec-morganstanley/former-morgan-stanley-star-in-china-pleads-guilty-idUKBRE83P03J20120426.

3 Press Release, SEC Charges Former Morgan Stanley Executive, *supra* note 1.

4 Complaint at 13, SEC v. Peterson, 2012 WL 1440462 (E.D.N.Y. 2012) (No. 12CV 02033) ("[T]he Chinese Official showed Peterson the written offer of one competing bidder in confidence 'to make clear the competition we're facing' and had 'really gone out of his way to help [Morgan Stanley] on this deal.'").

5 *Id.* at 1.

6 *Id.* at 12.

7 Press Release, SEC Charges Former Morgan Stanley Executive, *supra* note 1. Peterson was also sentenced to nine months in prison due to related Department of Justice criminal charges. *See* Scott Cohn, *Ex-MS Banker in China Bribery Case: My Side of Story*, CNBC (Aug. 16, 2012, 7:27 PM), https://www.cnbc.com/2012/08/16/exms-banker-in-china-bribery-case-my-side-of-story.html.

8 15 U.S.C. § 78dd-1(a) (2018).

9 140 S. Ct. 1936 (2020).

10 *Id.* at 1940. Disgorgement refers to remedies that "eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty." RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51 (AM. L. INST. 2010).

civil actions involving FCPA violations.[11] Post-*Liu* changes to the law that expressly allow the SEC to seek disgorgement and raise the statute of limitations for some securities law violations,[12] while a laudable first step by Congress, have not completely addressed the problems created by *Liu* and *Kokesh v. SEC*, a 2017 case in which the Supreme Court first questioned the equitable nature of SEC disgorgement.[13]

Part I of this Comment discusses the FCPA, which was passed in the aftermath of the Watergate scandal when congressional hearings revealed a pattern of questionable foreign payments by U.S. corporations.[14] This legislation allows the SEC to pursue civil actions against issuers[15] and their officers, like Peterson, when they bribe foreign officials to secure business.[16] The FCPA also creates an affirmative duty on these issuers to maintain books, records,[17] and internal control systems to prevent such actions.[18] Part II explores how the SEC has used legislation to enforce FCPA actions before and after the introduction of a provision within the Sarbanes-Oxley Act (SOX) in 2002. This provision enabled the SEC to seek "any equitable relief that may be appropriate or necessary for the benefit of investors" under any provision of the securities laws, providing a statutory basis for the use of disgorgement in judicial enforcement actions.[19] However, due in part to alleged SEC overreach,[20] the Supreme Court has threatened the viability of disgorgement as an SEC enforcement action in the recent decisions of *Kokesh* and *Liu.* Part III argues that, despite the absence of specific identifiable victims in FCPA enforcement, disgorgement is both an "appropriate" and "necessary" relief, and that courts should allow it as an equitable remedy subject to certain limits.[21] Part IV analyzes recent changes to the statute that expressly authorized disgorgement and raised the statute of limitations for certain security violations. This Part argues that the murky nature

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[11] *See Disgorgement's Role in SEC Enforcement Actions: An Analysis of the Supreme Court's Decision in* Liu v. SEC, CADWALADER (June 24, 2020), https://www.cadwalader.com/resources/clients-friends-memos/disgorgements-role-in-sec-enforcement-actions-an-analysis-of-the-supreme-courts-decision-in-liu-v-sec.

[12] Pub. L. No. 116-283 § 6501, 134 Stat. 3388, 3416 (2021).

[13] 137 S. Ct. 1635 (2017).

[14] Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 932 (2012).

[15] *FCPA 101*, FCPA PROFESSOR, https://fcpaprofessor.com/fcpa-101/ (last visited Nov. 2, 2022) ("An 'issuer' is generally a company (U.S. or foreign) that has a class of securities . . . traded on a U.S. exchange or an entity that is otherwise required to file reports with the [SEC].").

[16] 15 U.S.C. § 78dd-1(a)(1) (2018).

[17] *Id.* § 78m(b)(2)(A).

[18] *Id.* § 78m(b)(2)(B).

[19] *Id.* § 78u(d)(5).

[20] *See* Dieter Juedes, *Taming the FCPA Overreach Through an Adequate Procedures Defense*, 4 WM. & MARY BUS. L. REV. 37, 55 (2013).

[21] *See* Liu v. SEC, 140 S. Ct. 1936, 1940 (2020) (describing § 78u(d)(5)'s requirements).

of this new legislation creates open questions about FCPA disgorgement that Congress should rectify with additional legislation. In doing so, Congress should take the opportunity to provide the SEC with the type of funding that is commensurate with its considerable responsibilities.

I. FCPA BACKGROUND

Passed in 1977, the Foreign Corrupt Practices Act (FCPA) was an audacious piece of legislation. This "pioneering statute" was the first in the world to govern "domestic business conduct with foreign government officials in a foreign market."[22] Investigations in the 1970s by the Office of the Watergate Special Prosecutor, the SEC, and a congressional subcommittee revealed that U.S. corporations had made inappropriate contributions to the President of the Republic of Korea, "a Saudi Arabian general," Italian political parties, the President of Honduras, and others.[23]

Congress believed that legislation prohibiting acts of bribery was warranted for many policy reasons. Among them were concerns about foreign policy, the protection of investors,[24] morality, foreign support, and the protection of the entire free market economy. Congressional rhetoric showed concerns for U.S. investors and about the damage to the reputation of American business abroad.[25] Advocates for passing the FCPA stressed that the vast bulk of ethical law-abiding American businesses should not suffer because of the actions of a few bad apples.[26] Congressional debate revealed worries that if those tempted to bribe foreign officials were not deterred from continued acts of bribery, the resulting bad publicity might lead to further communist appropriation of American businesses or the rise of another nationalist like Quaddafi.[27] Members of a congressional committee believed that most countries would invite U.S. efforts to discourage "the corrupting influence of some United States-based

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22 Koehler, *supra* note 14, at 930 (emphasis omitted).

23 *Id.* at 932–35.

24 The Commission initially indicated it did not want to be in charge of regulating "a particular aspect of corporate behavior," stressing that it was a disclosure agency. *Id.* at 963. The Ford administration advocated, but failed, to put forward legislation that would have established a disclosure role for the SEC, rather than an enforcement role. *Id.* at 984.

25 Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1625–26 (2017).

26 Koehler, *supra* note 14, at 937.

27 *Id.* at 939–40 (quoting Sen. Frank Church, who argued "[t]he large and steady gains made by the Italian Communist Party in recent elections" were due to their appearance as the only "non-corrupt political force in the country" because American businesses had given bribes to "moderate democratic and pro-free-enterprise" forces in that country).

multinationals."[28] Furthermore, bribery itself corroded and could destroy the entire free market system,[29] and a law prohibiting bribery would make it easier to resist the temptation corporations might feel to bribe foreign officials.[30] Bribery, if tolerated, would direct business "not to the most efficient producer, but to the most corrupt."[31]

While many advocated for the introduction of the FCPA, some voiced concerns about the proposed legislation. Some questioned the wisdom of making it illegal for U.S. businesses to engage in foreign bribery in countries where bribery was not illegal.[32] Furthermore, Congress and the press debated the idea that holding U.S. businesses accountable might put them at a competitive disadvantage vis-à-vis foreign competitors.[33] Despite these objections, Congress passed the FCPA, and President Carter signed it into law in 1977[34] as an ambitious effort to stop a practice that was seen as "both corrupt and counterproductive."[35] The FCPA provides the SEC[36] with the tools to solve the problem of international corruption in two distinct ways: anti-bribery provisions[37] and accounting provisions.[38] The SEC is responsible for civil enforcement of these provisions "over 'issuers' . . . and their officers, directors, employees, agents, or stockholders acting on the issuer's behalf."[39] Section A below explains the anti-bribery provisions and section B explains the accounting

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[28] *Id.* at 945.

[29] *Id.* at 947; *cf.* Brewster, *supra* note 25, at 1625 (describing how improper payments damage the credibility of the U.S. economic system and lend credence to Marxists)

[30] *Unlawful Corporate Payments Act of 1977: Hearing on H.R. 3815 Before the Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate & Foreign Rels.*, 95th Cong. 1–2 (1977) (statement of Rep. Eckhardt, Chairman, Subcomm. on Consumer Prot. & Fin.).

[31] Koehler, *supra* note 14, at 947.

[32] *Id.* at 972–75.

[33] *Compare* Milton S. Gwirtzman, *Is Bribery Defensible?*, N.Y. TIMES, Oct. 5, 1975, at 20 ("The American businessman who won't pay off foreign officials risks loss of sales to competitors who continue the practice without embarrassment."), *with* Koehler, *supra* note 14, at 947 ("[P]rohibiting payments to foreign government officials could give U.S. companies a competitive advantage and actually help companies resist foreign payment demands.").

[34] Koehler, *supra* note 14, at 1002.

[35] *Id.* at 981.

[36] While this Comment focuses on the powers given to the SEC, a brief mention of DOJ responsibilities is warranted. The DOJ has criminal enforcement authority over "issuers" and individuals employed for these companies. 15 U.S.C. § 78dd-1 (2018). Additionally, the DOJ has criminal and civil enforcement responsibilities over "domestic concerns" and persons other than issuers or domestic concerns. *Id.* §§ 78dd-2, 78dd-3.

[37] *Id.* § 78dd-1.

[38] *Id.* § 78m(b)(2)(A); *Id.* § 78m(b)(2)(B).

[39] DEP'T OF JUST. & SEC, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICE ACT 4 (n.d.) [hereinafter RESOURCE GUIDE], https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf. Issuers are companies that are listed on a national securities exchange or trade their stock in the over-the-counter market and are required to file SEC reports. *Id.* at 11.

provisions. Finally, section C explains what remedies the SEC has available to enforce these provisions.

A. The FCPA Anti-Bribery Provisions

The FCPA anti-bribery provisions can be enforced against U.S. companies and nationals without any U.S. nexus[40] and even foreign issuers and nationals whose only connection to the United States is an email that goes through a U.S.-based server.[41] Generally, the anti-bribery provisions prohibit "individuals and businesses from bribing foreign government officials in order to obtain or retain business."[42] More specifically, issuers and their employees are prohibited from "offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official" as a means of "influenc[ing] any act or decision of the foreign official in his or her official capacity or . . . secur[ing] any other improper advantage in order to obtain or retain business."[43] For example, in the Peterson case, Peterson's offers and payments to the Chinese official to secure business for Morgan Stanley were violations of the anti-bribery provisions of the FCPA.[44]

B. The FCPA Accounting Provisions

The SEC is also responsible for enforcing the FCPA's accounting provisions. There are two components to these provisions. First, the "books and records" provision[45] reflects the idea that an issuer should provide accurate information to its shareholders.[46] Second, the internal control provisions[47] compel the company to ensure that it establishes a system of compliance with the books and records obligations. Because historically "corporate bribery has been concealed by the falsification of books and records," these two accounting provisions aim to prevent their coverup.[48] If an issuer were to try to conceal a

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40 15 U.S.C §§ 78dd-1(g), 78dd-2(i) (2018).

41 *See* SEC v. Straub, 921 F. Supp. 2d 244, 264 (S.D.N.Y. 2013).

42 RESOURCE GUIDE, *supra* note 39, at 10.

43 *Id.*

44 Complaint at 1, SEC v. Peterson, 2012 WL 1440462 (E.D.N.Y. May 10, 2012) (No. 12-CV-02033); *see supra* Introduction.

45 15 U.S.C. § 78m(b)(2)(A) (2018) ("Every issuer . . . shall (A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.").

46 Koehler, *supra* note 14, at 942 ("Not only is a publicly owned corporation unaccountable to the public when it uses its assets to bribe foreign governmental officials, but also it is unaccountable to its shareholders, the ones to whom the assets belong." (citations omitted)).

47 15 U.S.C. § 78m(b)(2)(B) (2018).

48 S. REP. NO. 95-114, at 3 (1977).

bribe to a foreign official as something else, such as a consulting fee or a miscellaneous expense, they would be in violation of the books and records provision.[49] The existence of an effective internal control system, in theory, should prevent these violations. For example, German automobile manufacturer Daimler AG was accused by the SEC of paying bribes of at least $56 million to government officials to secure business in twenty-two countries, violating the anti-bribery provisions.[50] Daimler AG then hid these payments, which were in violation of the FCPA books and records provisions, as "after sales service fees."[51] The SEC argued that, despite its obligations as an issuer on U.S. markets, Daimler's FCPA compliance program was "virtually non-existent."[52] Accordingly, Daimler agreed to pay $91.4 million in disgorgement[53] to settle the SEC charges and $93.6 million in fines.[54] When an organization, such as Morgan Stanley in the Peterson case, has a well-funded effective compliance system in place, it can avoid liability for the acts of individuals who commit violations of the anti-bribery provisions or circumvent the internal control provision.[55] The FCPA also contains "one exception and two affirmative defenses" baked into the statute to prevent it from being too heavy-handed.[56]

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49 RESOURCE GUIDE, *supra* note 39, at 39.

50 Final Judgment as to Defendant Daimler AG at 2, SEC v. Daimler AG (D.D.C. Mar. 22, 2010) (No. 10-CV-473).

51 *Id.*

52 *Id.* at 5.

53 Daimler AG was required to pay the money to the SEC and the SEC was then required to remit the funds to the U.S. Treasury. *See* Final Judgment as to Defendant Daimler AG at 11-12, 10-CV-0047 (D.D.C. 2010). In the Peterson case, Peterson's ill-gotten gains were in the form of an ownership interest in a Shanghai apartment complex, which was relinquished to a court-appointed receiver. Conceivably these funds did or ultimately will end up in the U.S. Treasury. *See* Press Release, SEC Charges Former Morgan Stanley Executive, *supra* note 1.

54 *Investor Bulletin: SEC Investigations*, U.S. SEC. & EXCH. COMM'N (Oct. 22, 2014), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_investigations.html.

55 Amy J. Conway-Hatcher, *The Big Three FCPA Lessons from the Morgan Stanley Case*, LEXOLOGY (July 11, 2012), https://www.lexology.com/library/detail.aspx?g=e8b770f4-311c-46f8-ac4a-3d3facff075b.

56 *FCPA 101*, *supra* note 15. Congress was aware of foreign, cultural, and legal differences, and carved out an exception to the FCPA allowing facilitating payments to foreign officials for "routine government action." 15 U.S.C. § 78dd-1(b) (2018); *see* Koehler, *supra* note 14, at 976 ("The definition of a bribe does differ from country to country."); *cf.* Gwirtzman, *supra* note 33, at 110 (explaining West German law allowed companies to deduct foreign bribes on their tax returns). The anti-bribery provisions do not prohibit "payments made to secure permits, licenses, or the expeditions performance of similar duties of an essentially ministerial or clerical nature." *FCPA 101*, *supra* note 15. In addition, the first of the two affirmative defenses recognizes cultural and legal differences and permits the payment of "anything of value" that is "lawful under the written laws and regulations" in the foreign country. 15 U.S.C. § 78dd-1(c)(1) (2018). The second affirmative defense allows the payment of "anything of value" if it was a "reasonable and bona fide expenditure" for a foreign official, "such as travel and lodging expenses" for the purposes of product demonstration or towards executing or performing a contract. *Id.*; *id.* § 78dd-1(c)(2).

C. Consequences for FCPA Violations

The SEC may bring an enforcement action for any violation of a federal securities law.[57] Accordingly, under the FCPA, the SEC can pursue civil actions against issuers and their directors, officers, employees, agents, or stockholders for violations of both the anti-bribery and accounting provisions of the Act.[58] The SEC has access to "a panoply of sanctions and remedies."[59] Statutorily, violations of the anti-bribery provisions by either corporations or individuals can lead to penalties of up to $16,000 per violation for corporations and $16,000 per violation for individuals.[60] Violations of the accounting provisions allow the SEC to obtain a civil penalty "not to exceed the greater of (a) the gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation."[61] Depending on the egregiousness of the violations, these limitations could be as high as $150,000 for an individual or $725,000 for a company.[62] Additionally, there are non-monetary penalties that both individuals and companies can face, such as debarment.[63]

It is important to note that the SEC, at its founding in the 1930s, did not even have the statutory power to obtain monetary relief.[64] Instead, securities laws only permitted the SEC to seek "injunctions, registration revocations, and professional bars."[65] Nevertheless, it sometimes did obtain relief for investors as early as the 1940s despite the lack of statutory authority to do so.[66] In 1968, the Second Circuit recognized the ability of the SEC to obtain equitable relief as an ancillary remedy despite the lack of express statutory authority.[67] In *SEC v. Texas Gulf Sulphur*, a case famous for establishing the ability of the SEC to

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57 15 U.S.C. § 78u(d) (2018); U.S. SEC. & EXCH. COMM'N, ENFORCEMENT MANUAL 13 (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf (explaining when enforcement actions can take place).

58 RESOURCE GUIDE, *supra* note 39, at 10–11, 42–43.

59 Urska Velikonja, *Public Enforcement After Kokesh: Evidence from SEC Actions*, 108 GEO. L.J. 389, 443 (2019).

60 RESOURCE GUIDE, *supra* note 39, at 69.

61 *Id.*

62 *Id.*

63 *Id.* at 69–72.

64 Velikonja, *supra* note 59, at 399.

65 *Id.*

66 *See* John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977 DUKE L.J. 641, 642–43 (1977); *see also In re* The Purchase and Retirement of Ward La France Truck Corp. Class "A" & Class "B" Stocks, 13 SEC Decisions Orders & Releases 373, No. 4-51 at 378 (1946) (finding companies who violated securities laws would repay stockholders for lost value).

67 SEC v. Tex. Gulf Sulphur Co., 401 F. 2d 833, 864 (2d Cir. 1968); *see also* Roberta S. Karmel, *Will Fifty Years of the SEC's Disgorgement Remedy Be Abolished?*, 71 SMU L. Rev. 799, 809 (2018) (arguing federal courts have inherent authority to order disgorgement under general securities laws).

enforce insider trading violations,[68] the Second Circuit also made clear that injunctions alone were not sufficient to prevent violations of securities laws.[69] The court dismissed the defendant's argument that the SEC was only able to impose an injunction or restraining order.[70] Instead, the Second Circuit reasoned that courts can use "their inherent equity power" when it is "necessary for the protection of the investing public."[71] The court ordered that the defendants pay the profits they had gained from their scheme into an escrow account that could be accessed by the "SEC or other interested person" and would return to the company at the end of three years.[72] Thus, while Congress had not granted authority to the SEC to seek disgorgement or *any* other equitable remedy when the FCPA was passed in 1977, the SEC had been routinely using disgorgement as a remedy alongside its statutorily granted powers for at least nine years.[73]

In 2002, the nature of the FCPA changed dramatically with the arrival of the Sarbanes-Oxley Act (SOX).[74] Passed with overwhelming support[75] in the aftermath of the Enron[76] and Worldcom[77] scandals, SOX made substantial

[68] *See* Lisa M. Fairfax, *From Equality to Duty: On Altering the Reach, Impact, and Meaning of the Texas Gulf Legacy*, 71 SMU L. REV. 729, 730 (2018).

[69] Following remand in 1971, the case returned to the Second Circuit, which upheld the combination of injunctions and disgorgement. SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1308, 1310 (2d Cir. 1971), *aff'g in part, rev'g in part* 312 F. Supp. 77, 90 (S.D.N.Y. 1970).

[70] *Tex. Gulf Sulphur Co.*, 312 F. Supp. at 90–91.

[71] *Id.* at 91.

[72] *Id.* at 93. While the court and the SEC described the measure taken as "accounting and restitution," scholars typically describe it as disgorgement. *See* Karmel, *supra* note 67, at 801; Velikonja, *supra* note 59, at 399–400 ("The measure of the disgorgement remedy is the somewhat vaguely defined ill-gotten gain, which is similar to but not coextensive with restitution, and includes any 'tangible profit causally connected' to the securities violation.").

[73] *See* Velikonja, *supra* note 59, at 399. Other circuits soon followed the Second Circuit in allowing disgorgement as an equitable remedy. *E.g.*, Baumel v. Rosen, 412 F.2d 571, 576 (4th Cir. 1969); Fridrich v. Bradford, 542 F.2d 307, 322 (6th Cir. 1976) ("[T]he SEC may ask the federal district court, in the exercise of its equity jurisdiction . . . to require an insider to disgorge any profits he may have made from his illegal trading."). The SEC first used disgorgement in an FCPA case in 1983. SEC v. World-Wide Coin Inv., 567 F. Supp. 724, 760 (N.D. Ga. 1983).

[74] Sarbanes-Oxley Act of 2002, 107 P.L. 204, 116 Stat. 745; *see* Elisabeth Bumiller, *Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES, July 31, 2002, at A1.

[75] It passed the House with a vote of 423 in favor, 3 opposed, and 8 abstaining. HOUSE OF REPRESENTATIVES, CLERK, FINAL VOTE RESULTS FOR ROLL CALL 348, https://clerk.house.gov/evs/2002/roll348.xml. It passed the Senate with 99 in favor and 1 abstaining. *Roll Call Vote 107th Congress–2nd Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00192 (last visited Feb. 2, 2022).

[76] *See* Troy Segal, *Enron Scandal: The Fall of a Wall Street Darling*, INVESTOPEDIA, https://www.investopedia.com/updates/enron-scandal-summary/ (Nov. 26, 2021).

[77] *See* Adam Hayes, *The Rise and Fall of WorldCom*, INVESTOPEDIA, https://www.investopedia.com/terms/w/worldcom.asp (Oct. 5, 2021).

changes to the makeup of the country's regulatory oversight regime, generally,[78] and to the SEC's powers to enforce the FCPA, specifically.[79] SOX has led to a dramatic surge in FCPA enforcement.[80] Important for the context of the SEC's ability to punish violators of the FCPA was the insertion of Section 78u(d)(5) into Section 21(d) of the Securities Exchange Act of 1934, allowing equitable relief.[81] Section 78u(d)(5) reads, "In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors."[82] Like it did in response to the bribery scandals of the 1970s, Congress had, perhaps unwittingly, significantly increased the power of the SEC to seek much broader remedies under all types of securities violations than it had previously been able to do.[83] Because the SEC had been using disgorgement as a way to secure equitable relief for decades,[84] it continued to do so, albeit with increased vigor.[85] With the new disclosure requirements imposed by SOX,[86] the SEC's enforcement actions increased both in number and in payout.[87] However, because Congress failed to expressly define what remedies were equitable,[88] and the legislative history was largely silent,[89] the SEC's use of disgorgement was criticized as not "equitable."[90] This conflict between the SEC and its critics

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78 For example, SOX created the Public Company Accounting Oversight Board. 107 P.L. 204, 116 Stat. 745 (2002).

79 *See* Will Kenton, *Sarbanes-Oxley (SOX) Act of 2002*, INVESTOPEDIA, https://www.investopedia.com/terms/s/sarbanesoxleyact.aspp (Feb. 4, 2020).

80 *See* Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 515 (2011).

81 107 P.L. 204, 116 Stat. 745 (2002).

82 15 U.S.C. § 78u(d)(5).

83 *See* Liu v. SEC, 140 S. Ct. 1936, 1940 (2020). *See generally* Michael F. Perlis, *Investigating the FCPA*, FORBES (Dec. 8, 2009, 1:06 PM), https://www.forbes.com/2009/12/08/foreign-corrupt-practices-act-opinions-contributors-michael-perlis-wrenn-chais.html#666cab114e81 (detailing the rise frequency of FCPA enforcement actions and sizes of awards over time).

84 Karmel, *supra* note 67.

85 *See* Laura E. Kress, *How the Sarbanes-Oxley Act Has Knocked the "SOX" off the DOJ and SEC and Kept the FCPA on Its Feet*, 10 U. PITT. J. TECH. L. & POL'Y 1, 10–12 (2009); Thomas Fox, *The FCPA and Sox and Internal Controls–Twin Sons of a Different Mother?*, JDSUPRA (May 13, 2016), https://www.jdsupra.com/legalnews/the-fcpa-and-sox-and-internal-controls-31210/.

86 Sarbanes-Oxley Act of 2002, Pub. L. 107–204, 116 Stat. 745; *see* Kenton, *supra* note 79.

87 *See FCPA 101*, *supra* note 15.

88 15 U.S.C § 78u(d)(5).

89 There is argument over whether this means that Congress meant to allow disgorgement. *Compare* Karmel, *supra* note 67, at 802 ("Congress assumed that disgorgement was an equitable remedy the SEC could obtain in the district courts."), *with* Brief of Amici Curiae Law Professors in Support of Petitioners at 2, Liu v. SEC, 140 S. Ct. 1936 (2020) (No. 18-1501) ("Congress has not extended the same authorization to pursue awards of 'disgorgement.'").

90 *See* Brief of Amici Curiae, *supra* note 89, at 2, 4; SEC v. Kokesh, 137 S. Ct. 1635, 1644 (2017).

would come to a head in several cases, which would make their way before the Supreme Court and plunge the area of law into confusion[91]—a development that is the focus of Part II.

II. RECENT CHALLENGES: *KOKESH* AND *LIU*

After the passage of SOX, enforcement of the FCPA became a priority for the SEC and increased significantly.[92] Though underfunded,[93] the agency increased the number of enforcement actions under the FCPA after 2002.[94] In 2010, it created a specialized unit solely for focusing on violations of the FCPA.[95] In an effort to encourage corporations to cooperate with the SEC, the enforcement wing of the SEC announced the existence of new tools for adherence to the new rules,[96] and warned wrongdoers that their "hushed plans[,] . . . schemes and deceptions" would come to light.[97]

However, despite the SEC's optimism and stern warnings, several Supreme Court decisions, both preceding and following the enactment of SOX in 2002, have threatened the SEC's ability to fully deter wrongdoers. Section A of this Part explains how the Supreme Court put the brakes on the ability of the federal courts to craft equitable remedies in *Grupo Mexicano de Desarollo, SA v. Alliance Bond Fund, Inc.* by forcing these courts to look to the historic record to determine the availability of an equitable remedy in 1789. Some lower courts, such the Second Circuit in *SEC v. Cavanagh*, narrowed the ruling of *Grupo* by looking to the purpose of the remedies. Section B discusses the 2017 decision of *Kokesh v. SEC*, in which the Supreme Court looked at the ability of the SEC to seek equitable remedies and signaled in a footnote that disgorgement for SEC enforcement purposes might not be equitable *at all*. Finally, section C explores the *Liu v. SEC* decision from 2020, in which the Court upheld the ability of the

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91 *See infra* Part II.

92 *See* Thomas R. Fox, *FCPA Enforcement: Why the Increase Between the First 25 Years and the Last 5?*, FCPA COMPLIANCE & ETHICS BLOG (Mar. 11, 2011), https://www.lexisnexis.com/legalnewsroom/corporate/b/fcpa-compliance/posts/fcpa-enforcement-why-the-increase-between-the-first-25-years-and-the-last-5.

93 *See* Kurt N. Schacht, *SEC, Strapped for Funds, Can't Police Financial Markets*, THE HILL (July 9, 2018, 9:30 AM), https://thehill.com/opinion/finance/396064-sec-strapped-for-funds-cant-protect-investors.

94 *See* Fox, *supra* note 92.

95 Press Release, U.S. Sec. & Exch. Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010) (available at https://www.sec.gov/news/press/2010/2010-5.htm).

96 Speech, Robert S. Khuzami, Dir., SEC Div. of Enf't, Remarks at News Conference Announcing Enforcement Cooperation Initiative and New Senior Leaders (Jan. 13, 2010) (available at https://www.sec.gov/news/speech/2010/spch011310rsk.htm).

97 *Id.*

federal courts to grant disgorgement as an equitable remedy if they adhered to certain principles.

A. Grupo-Mexicano*'s "Historic" Approach*

The first U.S. Supreme Court case that threatened the powers of the SEC under SOX was *Grupo Mexicano De Desarrollo v. Alliance Bond Fund*.[98] While the particulars of the case are not important to this Comment, what is important is the Court's view on the powers of the federal district courts to grant equitable remedies.[99] In a 5-4 opinion written by Justice Scalia, the Court found that the federal district courts had been conferred jurisdiction over "all suits . . . in equity" by the Judiciary Act of 1789.[100] Justice Scalia's opinion interpreted this to mean federal courts *only* had jurisdiction to dispense equitable relief that was "traditionally accorded by courts of equity" at the time of the passage of the Judiciary Act[101]—that is, 1789. While prior to *Grupo*, the federal courts had not been shy about enlarging the contours of what would be allowed as equitable measures, this decision signaled that there would be significant limitations on what would be allowed moving forward.[102]

Despite *Grupo*, the power of the SEC to seek disgorgement for violations of securities laws remained unthreatened for nearly twenty years. For example, in a 2006 opinion, the Second Circuit upheld the SEC's use of disgorgement to enforce violations of the registration and antifraud provisions of securities laws.[103] The court reasoned that what was important was not the name of the remedy historically used by equity courts, "but rather their specific actions and the resulting practical consequences."[104] The court then underwent the sort of historical survey[105] advocated for by Justice Scalia in *Grupo* and held that the fact that "the term 'disgorgement' ha[d] entered common legal parlance only recently" did not "obscure that the ancient remedies of accounting, constructive

98 *See* Grupo Mexicano De Desarrollo v. All. Bond Fund, 527 U.S. 308 (1999).
99 *Id.* at 318.
100 *Id.* (citations omitted).
101 *Id.* at 319. *But see id.* at 336 (Ginsburg, J., dissenting) ("[T]he Court relies on an unjustifiably static conception of equity jurisdiction. From the beginning, we have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England.").
102 *See* Theresa A. Gabaldon, *Equity, Punishment, and the Company You Keep: Discerning a Disgorgement Remedy Under the Federal Securities Laws*, 105 CORNELL L. REV. 1611, 1651–52 (2020).
103 SEC v. Cavanagh, 445 F.3d 105, 109, 121 (2d Cir. 2006).
104 *Id.* at 118.
105 *Id.* at 118–20.

trust, and restitution ha[d] compelled wrongdoers to 'disgorge' . . . their ill-gotten gains for centuries."[106]

B. Kokesh*'s Footnote Three Threatened the Existence of SEC Disgorgement Writ Large*

In 2017, the Supreme Court returned to the question of the SEC's power to disgorge as an equitable remedy in *Kokesh v. SEC*.[107] The issue in *Kokesh* was not whether disgorgement was an equitable remedy, but rather whether disgorgement was a penalty for the purposes of a five-year statute of limitations in 28 U.S.C § 2462.[108] The Court, which had previously ruled that Section 2462's five-year limitation applied when the Commission sought monetary civil penalties,[109] analyzed whether Kokesh—an adjudged fraudster who, between 1995 and 2009, misappropriated nearly $35 million from four companies that sought investment advice from his firms—would have to disgorge those funds.[110] The SEC alleged that Kokesh concealed his ill-gotten gains through filing "false and misleading SEC reports and proxy statements" and sought civil penalties, disgorgement, and an injunction against Kokesh.[111] The district court ruled, and the Tenth Circuit affirmed, that disgorgement of $29.9 million in ill-gotten gains was appropriate—even though it fell outside of the five-year statute of limitations period—because disgorgement was not a "penalty" under Section 2462.[112]

The Supreme Court overturned the decision, holding that for the purposes of Section 2462, disgorgement was a penalty.[113] This decision was based on two rationales. First, a sanction is a penalty when it is trying to redress a wrong to

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106 *Id.* at 119. *But see* Francesco A. DeLuca, *Sheathing Restitution's Dagger Under the Securities Acts: Why Federal Courts Are Powerless to Order Disgorgement in SEC Enforcement Proceedings*, 33 REV. BANKING & FIN. L. 899, 930 (2014) (arguing *Cavanagh* was wrongly decided because disgorgement was only allowed historically in English equity cases involving fiduciary obligations).

107 137 S. Ct. 1635, 1639 (2017).

108 *Id.*

109 *See* Gabbelli v. SEC, 568 U.S. 442, 445, 454 (2013). The Court also held that the statute of limitations period began when the allegedly fraudulent conduct occurred, not when it was brought to light. *Id.* at 454. This threatens FCPA enforcement actions in which acts of bribery often take over four years to be investigated. *See The Gray Cloud of FCPA Scrutiny Lasted Too Long in 2017*, FCPA PROFESSOR (Jan. 4, 2018) [hereinafter *Gray Cloud*], https://fcpaprofessor.com/gray-cloud-fcpa-scrutiny-lasted-long-2017/. This is counterbalanced by subsequent changes to Section 78u(d) that toll the statute of limitations for any time a person is outside of the United States. 15 U.S.C. § 78u(d)(8)(C) (2021).

110 *Kokesh*, 137 S. Ct. at 1641.

111 *Id.*

112 *Id.*

113 *Id.* at 1645.

the public, rather than to an individual.[114] Disgorgement, the Court reasoned, is a remedy for a violation of public laws, which is why "a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution."[115] Second, "a pecuniary sanction operates as a penalty" only if it is sought to punish and deter, rather than for the purpose of "compensating a victim for his loss."[116] The Court decided that disgorgement is punitive, meaning it primarily functions as a deterrent against future violations.[117] Furthermore, disgorgement is not always compensatory. Sometimes "disgorged funds are paid to victims; other funds are dispersed the United States Treasury."[118] Accordingly, Kokesh walked away with nearly $30 million in ill-gotten gains because his fraud did not come to light quickly enough.[119]

The Court's conclusion—that "[b]ecause disgorgement orders 'go beyond compensation, are intended to punish, and label defendants wrongdoers' as a consequence of violating public laws, they represent a penalty"[120]—erected a serious hurdle to the SEC's enforcement abilities by labeling it as a penalty for statute of limitations purposes.[121] Even more ominous, a footnote the Court included seemed to threaten the entire existence of court-ordered disgorgement as an equitable remedy.[122] While the footnote stated that the Court was not opining on whether "courts possess[ed] authority to order disgorgement in SEC enforcement proceedings,"[123] commentators remarked that it was "widely understood to threaten"[124] the existence of the remedy. This footnote, along with pointed questions raised during oral argument that criticized the lack of express

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114 *Id.* at 1642.
115 *Id.* at 1643.
116 *Id.* at 1642.
117 *Id.* at 1643 ("[T]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains." (citations omitted)).
118 *Id.* at 1644.
119 *Id.* at 1641.
120 *Id.* at 1645 (citations omitted).
121 U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT: DIVISION OF ENFORCEMENT 5 (2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf ("[T]he decision may cause us to forego up to approximately $900 million in disgorgement.").
122 *Kokesh*, 137 S. Ct. at 1642 n.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.").
123 *Id.*
124 Velikonja, *supra* note 59, at 423.

statutory permission to disgorge funds,[125] was viewed as an invitation to challenge what the SEC and observers had viewed as a long-settled remedy.[126]

C. Liu *Lays Out Limitations*

The challenge to disgorgement as an equitable remedy that many expected after *Kokesh* arrived in the summer of 2020 in *Liu v. SEC*.[127] In *Liu*, husband and wife Charles Liu and Xin Wang solicited foreign nationals to invest nearly $27 million to construct a cancer treatment center through the EB-5 Immigrant Investor Program.[128] Instead of spending the money on a center, they spent nearly $20 million on salaries and marketing expenses—far in excess of what their offering memorandum permitted—and diverted funds to a personal account.[129] After their behavior came to light, the SEC brought a civil action in federal court seeking disgorgement of the full amount they had raised from investors, as well as an injunction against the couple from participating in the EB-5 Program.[130] The couple argued that they should be able to offset the disgorgement award by millions of dollars in operating expenses, while the SEC argued that it would be unjust to allow them to claim business expenses to run a business meant to defraud investors.[131] The district court sided with the SEC and held the couple jointly and severally liable for the full amount they had raised from investors, and the Ninth Circuit affirmed.[132] The Supreme Court granted their petition for certiorari.[133]

The Supreme Court, in an 8-1 opinion written by Justice Sotomayor, largely sided with the SEC and upheld its ability to disgorge profits under Section 78u(d)(5) as a remedy allowed as equitable relief.[134] In making this judgment, the Court looked to works on equity jurisprudence and determined disgorgement

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[125] Sarah N. Lynch, *U.S. Top Court Questions SEC's Powers to Recover Ill-Gotten Profits*, 23 No. 12 WESTLAW J. DERIVATIVES 2 (2017) ("Justice Neil Gorsuch . . . was even more blunt, complaining there was no actual statute governing disgorgement and whether or not the money is paid out to victims or kept by the government.").

[126] *See* Stephen M. Bainbridge, *Kokesh Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 WASH. U. J.L. & POL'Y 17, 17 (2018) ("[T]he Court's opinion actually cast considerable doubt on the validity of the seemingly well-established disgorgement sanction.").

[127] 140 S. Ct. 1936, 1941 (2020).

[128] *Id.* at 1941.

[129] *Id.* at 1941–42.

[130] *Id.* at 1942.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* at 1939–40.

was a remedy that was typically available in equity.[135] Like the Second Circuit in *Cavanagh*,[136] the Court did not blithely focus on the recent origin of the word disgorgement but instead inquired into the purpose behind the remedy.[137] Their analysis of jurisprudence revealed two important 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."[138]

Here, disgorging profits from Liu was acceptable as an equitable remedy, but the lower courts made two mistakes. First, they needed to consider what legitimate business expenses Liu sustained in building up the cancer research center,[139] as well as whether he and his wife were working in concert in the fraudulent endeavor.[140] The district court had assumed that the expenses "were incurred for the purposes of furthering an entirely fraudulent scheme" and so declined to deduct them.[141] While this is fine if the expenses are simply "wrongful gains 'under another name,'" the lower courts must ascertain whether they are legitimate to make sure the disgorgement award is allowed as an equitable measure.[142] Second, the common law rule insisted there should be "individual liability for wrongful profits" and the SEC's practice of joint liability "could transform any equitable profits-focused remedy into a penalty."[143] However, because the "historic profits remedy" does allow liability for "partners engaged in concerted wrongdoing," the Court left it to the Ninth Circuit on remand to determine whether facts indicated the married petitioners could, "consistent with equitable principles, be found liable for profits as partners in wrongdoing."[144]

The petitioners made a third argument vis-à-vis disgorgement that is of particular importance for this Comment: the SEC did not have power to disgorge

135 *Id.* at 1942.

136 SEC v. Cavanagh, 445 F.3d 105, 118 (2d Cir. 2006).

137 *Liu*, 140 S. Ct. at 1942 (2020). *But see id.* at 1951 (Thomas, J., dissenting) ("Disgorgement is not a traditional form of equitable relief. Rather, cases, legal dictionaries, and treatises establish that it is a 20th-century invention.").

138 *Id.* at 1942 (majority opinion).

139 *Id.* at 1950. ("[S]ome expenses from petitioners' scheme went toward lease payments and cancer-treatment equipment. Such items arguably have value independent of fueling a fraudulent scheme.").

140 *Id.* at 1949.

141 *Id.* at 1950.

142 *Id.* (quoting Rubber Co. v. Goodyear, 76 U.S. (9 Wall.) 788, 803 (1869)).

143 *Id.* at 1949.

144 *Id.*

profits to the Treasury rather than to wronged investors.[145] The Court reasoned the SEC's practice of depositing money disgorged from wrongdoers in the Treasury rather than returning it to investors was "in considerable tension with equity practices."[146] While Section 78u(d)(5) restricts equitable relief to the measures that "may be appropriate or necessary for the benefit of investors,"[147] the Dodd-Frank Wall Street Reform and Consumer Protection Act established a fund that allowed disgorgement awards not returned to investors to go to one of two other purposes: (1) paying whistleblowers who reported securities fraud, or (2) funding the activities of the Inspector General.[148] The Court emphasized that Section 78u(d)(5) did not indicate whether this practice was "appropriate or necessary" for investors and that, in equity, the profits remedy "generally requires the SEC to return a defendant's gains to wronged investors for their benefit."[149] The SEC failed to point to any "analogous common-law remedy" that allowed disgorging profits from a wrongdoer without actually disbursing them to known victims.[150] The Court also rejected the idea that simply denying the wrongdoers of their profits is enough to make the measure "appropriate or necessary."[151] If Congress had meant to allow the SEC to "simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains," it would not have included the qualifier "appropriate or necessary" within Section 78u(d)(5).[152]

Despite dismissing these arguments, the Court signaled it may be permissible for the SEC to deposit disgorged funds to the Treasury "where it is infeasible to distribute the collected funds to investors."[153] Neither party had "identified authorities revealing what traditional equitable principles govern when . . . the wrongdoer's profits cannot practically be disbursed to the

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145 *Id.* at 1939.

146 *Id.* at 1946.

147 *Id.* at 1947 (quoting 15 U.S.C. § 78u(d)(5) (2018)).

148 *Id.*; *id.* § 78u-6(g)(2) ("The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for (A) paying awards to whistleblowers . . . [and] (B) funding the activities of the Inspector General of the Commission.").

149 *Liu*, 140 S. Ct. at 1947–48 (citation omitted).

150 *Id.* at 1948.

151 *Id.* ("[T]he SEC's equitable, profits-based remedy must do more than simply benefit the public at large.").

152 *Id.* at 1947–48; *see also* Mertens v. Hewitt Assocs., 508 U.S. 248, 253 (1993) (analyzing the similar term "other appropriate equitable relief" under Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 250 29 U.S.C. § 1132 (a)(3)-(5)).

153 *Liu*, 140 S. Ct. at 1948. In *Liu* the SEC had not returned funds to investors because the fraudsters had allegedly "transferred the bulk of their misappropriated funds to China . . . and fled the United States." Brief for Respondent at 36, *Liu*, 140 S. Ct. 1936 (No. 18-1501).

victims."[154] Because there was no specific order in the case directing disgorged funds to the Treasury,[155] the Court punted this decision to the lower courts on remand to determine whether such an order would be for "the benefit of investors as required by [Section] 78u(d)(5) and consistent with equitable principles."[156] While Congress has returned to Section 78u(d) and provided express statutory permission for the SEC to seek disgorgement as a remedy,[157] questions surrounding the application of the law may require the SEC to continue to argue that disgorgement abides by the requirements laid out in *Liu*. Part III of this Comment argues that FCPA disgorgement does abide by the *Liu* limitations.

III. DISGORGEMENT FOR FCPA VIOLATIONS IS APPROPRIATE, NECESSARY, AND EQUITABLE

The Supreme Court's ruling in *Liu* put the ability of the SEC to disgorge profits at risk in two distinct categories: insider trading cases and FCPA cases.[158] This Comment focuses specifically on *Liu's* impact on FCPA enforcement. Because Section 78u(d)(5) states that any equitable remedy must be "appropriate or necessary for the benefit of investors,"[159] the Court indicated that disgorgement that returned money to the Treasury, rather than to wronged investors, was in considerable tension with equity practices.[160] The SEC admitted in *Liu* that, in FCPA cases, there is usually no known "universe of wronged investors" to whom money could be returned, and this money went to the Treasury.[161] Because *Liu* was not an FCPA case where money would automatically be sent to the Treasury and there had been no specific order to return money to the Treasury rather than wronged investors, the Court left it to lower courts to determine if disgorgement to the Treasury was both consistent with equitable practices and for the benefit of the investors.[162] While the language used by the Supreme Court will likely cause continued trepidation for

154 *Liu*, 140 S. Ct. at 1948–49.
155 *Id.* at 1949.
156 *Id.*
157 Pub. L. No. 116-283 § 6501, 134 Stat. 3388 (2021).
158 *See* CADWALADER, *supra* note 11.
159 15 U.S.C. § 78u(d)(5).
160 *Liu*, 140 S. Ct. at 1946.
161 Transcript of Oral Argument at 35, *Liu* v, 140 S. Ct. 1936 (No. 18-1501) ("[In] the FCPA cases . . . sometimes we do get big judgments. They're not returned to investors because there really is no obvious universe of individual victims from an FCPA violation . . . .").
162 *Liu*, 140 S. Ct. at 1949.

the SEC when pursuing disgorgement in FCPA cases,[163] the lower courts should interpret FCPA actions to disgorge to the Treasury as equitable, appropriate, and necessary for the benefit of investors.[164] Section A of this Part argues that disgorgement is appropriate and necessary for the benefit of investors. This section contends first, in the sphere of FCPA enforcement, that disgorgement is necessary to effectuate the purposes of securities legislation. Second, this section asserts that disgorgement is an appropriate remedy. Section B argues that disgorgement in FCPA enforcement actions aligns with equitable principles.

A. Disgorgement Is Appropriate and Necessary for the Benefit of Investors

Disgorgement is a necessary remedy for FCPA enforcement because of the difficulties associated with deterring acts of foreign bribery. Furthermore, because disgorgement benefits not only the public at large but also specific investors who are directly harmed by FCPA violations, it is an appropriate remedy under Section 78u(d)(5). For disgorgement to be allowed under Section 78u(d)(5), it must be an equitable remedy that is "appropriate or necessary for the benefit of investors."[165] In *Liu*, the Court rejected the idea that disgorgement was appropriate or necessary simply because "the primary function of depriving wrongdoers of profits is to deny them the fruits of their ill-gotten gains."[166] Because Congress included the qualifier "necessary or appropriate for the benefit of investors" at the tail end of Section 78u(d)(5),[167] for disgorgement to be allowed as an equitable remedy, it "must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains."[168]

Disgorgement of ill-gotten gains for FCPA violations benefits the public at large through deterrence.[169] Deterring bribery benefits investors in rival companies who adhere to the rule of law,[170] foreign governments and persons

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163 *See* CADWALADER, *supra* note 11 ("Companies should also press the SEC regarding its planned use for disgorged funds and, if harmed investors cannot readily be identified, push back against the SEC's claim for disgorgement in that case.").

164 *See Liu*, 140 S. Ct. at 1949.

165 15 U.S.C. § 78u(d)(5) (2018).

166 *Liu*, 140 S. Ct. at 1948.

167 15 U.S.C. § 78u(d)(5) (2018).

168 *Id.* (reasoning that, if the Court did not give effect to this phrase, it would violate the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute" (quoting Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881, 1890 (2019))).

169 *See* Nick Oberheiden, *10 Reasons Why FCPA Compliance Is Critically Important for Businesses*, NAT'L L. REV. (July 24, 2020), https://www.natlawreview.com/article/10-reasons-why-fcpa-compliance-critically-important-businesses.

170 *See* James Maton & Joshua W. Gardner, *Suing Bribing Competitors: The Next Tool in the International*

who are negatively hurt by the corrupting effects of bribery,[171] and the general functioning of a free-market economy.[172] However, importantly in the post-*Liu* landscape, disgorgement benefits the specific investors who buy shares issued by companies who trade on U.S. markets. While the SEC acknowledged that there are no specific investors in FCPA cases to whom money can be returned,[173] as in an action for restitution, research following *Kokesh* has made clear that there are specific investors who are injured if disgorgement is not available to remedy securities violations.[174] For these investors, the inclusion of disgorgement as an equitable remedy in FCPA enforcement actions is both necessary and appropriate and provides distinct identifiable benefits. Subsection One argues that deterrence of FCPA violations is necessary to protect investors. Subsection Two further argues that it is appropriate.

1. Disgorgement Is a Necessary Deterrent

Disgorgement is a necessary deterrent that ensures corporations adhere to strict accounting methods required by the FCPA and accompanying securities laws. For shareholders to meaningfully invest in the stock market, they must be knowledgeable about prospective investments, which is the reason SEC disclosure requirements exist.[175] However, Congress has realized, often after a calamitous shock to the market caused by fraudulent behavior, that disclosure requirements mean nothing if the agency lacks meaningful enforcement mechanisms to ensure compliance. The Great Depression led to the passage of the 1933 and 1934 Acts,[176] the Watergate scandal led to the passage of the FCPA,[177] the Enron and WorldCom scandals led to the passage of SOX,[178] and

Anti-Corruption Arsenal?, LEXOLOGY (May 15, 2008), https://www.lexology.com/library/detail.aspx?g=328309a6-3a12-44f0-a251-07ec5b82620c (describing the difficulty law abiding companies have in suing rival companies due to lack of a private right of action under the FCPA).

171 *See* GILLIAN DELL, EXPORTING CORRUPTION PROGRESS REPORT 2020: ASSESSING ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 21 (2020), https://images.transparencycdn.org/images/2020_Report_ExportingCorruptionFull_English.pdf (arguing foreign bribery has adverse impacts on human rights and negative impacts on state institutions).

172 Koehler, *supra* note 14, at 947.

173 Transcript of Oral Argument, *supra* note 161, at 34–35.

174 *See infra* Part III.A.2.

175 Daniel M. Gallagher, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks at Society of Corporate Secretaries & Governance Professionals (July 11, 2013) (available at https://www.sec.gov/news/speech/spch071113dmghtm) ("The underlying premise of the Commission's disclosure regime is that if investors have the appropriate information, they can make rational and informed investment decisions.").

176 Kokesh v. SEC, 137 S. Ct. 1635, 1639–40 (2017).

177 *See* Koehler, *supra* note 14, at 932.

178 *See* Kenton, *supra* note 79.

the 2008 financial crisis led to the passage of Dodd-Frank and resulted in the SEC's power to grant whistleblowers bounty awards.[179] Since the landmark *Texas-Gulf Sulphur* case, in which a federal district court first granted the SEC disgorgement in response to a securities violation,[180] Congress has enacted six different securities statutes that codified court-ordered disgorgement as a remedy in SEC enforcement actions.[181] With regards to SOX specifically, both the legislative history surrounding the statute[182] and President George W. Bush's State of the Union address calling for its implementation[183] expressly referred to the need to disgorge profits from wrongdoers. Prior to *Liu*, Congress did not spell out that "disgorgement" was allowed as a remedy for the SEC in judicial enforcement actions in the way that they have for other agencies, such as the Federal Trade Commission. Yet, Congress has consistently referred to it throughout legislation in a way that shows it intended that the SEC utilize it as a remedy.[184] And although the Supreme Court rejected the notion that congressional awareness of prior SEC practices negated the qualifying language of "appropriate or necessary for the benefit of investors" in Section 78u(d)(5),[185] the use of disgorgement in FCPA enforcement is necessary to effectuate Congress's desire to protect the public from further shocks to the market caused by shady accounting practices.[186] Both Congress and the courts recognized, even before the creation of the FCPA or addition of Section 78u(d)(5), that the purposes of the securities acts would be severely defeated if violators of the acts "were allowed to retain the profits from [their] violation[s]."[187] Because

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179 *See* Donna M. Nagy, *The Statutory Authority for Court-Ordered Disgorgement in SEC Enforcement Actions*, 71 SMU L. REV. 895, 917–18 (2018).

180 SEC v. Tex. Gulf Sulphur Co., 312 F. Supp 77, 92–94 (S.D.N.Y 1970).

181 *See id.* (arguing that these statutes, which include SOX, show congressional approval for equitable disgorgement).

182 *See* Nagy, *supra* note 179, at 915 (arguing the legislative history of SOX shows that Congress both "confirm[ed] the traditional remedy of court-ordered SEC disgorgement" and "provide[d] entirely new authorization" for it).

183 *The President's 10-Point Plan: Improving Corporate Responsibility*, WALL ST. J. (Mar. 6, 2002, 10:18 PM), https://www.wsj.com/articles/SB1015460971646141720 ("Under this proposal, CEO bonuses and other incentive-based forms of compensation would be disgorged in cases of accounting restatements resulting from misconduct.").

184 *See* Nagy, *supra* note 179, at 919; Gabaldon, *supra* note 102, at 54 (arguing the sloppiness of the federal securities enforcement scheme's creation is "strong—perhaps indisputable—evidence that Congress indeed simply forgot to authorize disgorgement expressly"). The legislative changes to Section 78u(d) that expressly allow for disgorgement support the argument that Congress always intended for the SEC to allow disgorgement though Section 78u(d)(5). *See infra* Part IV.

185 Liu v. SEC, 140 S. Ct. 1936, 1947 (2020).

186 *See* 148 CONG. REC. S6328 (2002) (statement of Sen. Sarbanes) ("[W]hat is transpiring is having a very severe impact on hard-working American families. Corporate wrongdoing is being felt not just at the boardroom table, but it is now being felt at the kitchen table as well.").

187 *See* SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971).

violators of the FCPA stand to gain windfalls far in excess of any statutorily allowed civil penalties, the removal of disgorgement as a tool for the SEC would severely defeat the purpose of the FCPA.[188]

Furthermore, given how difficult it is for the SEC to investigate FCPA violations, disgorgement is particularly necessary to deter acts of bribery and encourage U.S. issuers to implement strong accounting practices and compliance programs.[189] The difficulty in uncovering bribery abroad means that FCPA violations take longer to investigate than other securities fraud cases.[190] Accordingly, since the *Kokesh* holding that disgorgement is a penalty in the context of the five-year statute of limitations,[191] FCPA enforcement has been particularly inhibited.[192] Because the median length of time for companies to resolve an FCPA enforcement action is four and a half years,[193] many violators may be able to evade disgorgement of at least a portion of their ill-gotten gains.

Bribery is markedly difficult to detect because neither the payer nor the recipient of the bribe has any incentive to see their wrongdoing come to light. Additionally, there is no direct victim, like in the case of an offering fraud where an investor will have directly lost money in an identifiable way that would cause them to come forward and disclose the crime.[194] As a result, the SEC is particularly reliant on self-disclosure to determine whether a company has violated the FCPA, leading the agency to emphasize that reduced penalties and non-prosecution agreements will not be recommended without cooperation.[195] While there may still be incentives for companies to avoid the public spotlight

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[188] *See* Nerissa C. Brown, Brian Gale & Adrienna A. Huffman, Kokesh v. SEC: The Market Impact of Reducing SEC Enforcement Powers 13 (Feb. 8, 2021) (unpublished manuscript) (on file at https://ssrn.com/abstract=3292548).

[189] *See* Velikonja, *supra* note 59, at 435–36 ("If potential sanctions are lower, public firms and their subsidiaries might invest less in compliance. . . . A somewhat larger share of investigations may not settle and may result in litigation.").

[190] *Id.* at 414.

[191] Kokesh v. SEC, 137 S. Ct. 1635, 1639 (2017).

[192] Velikonja, *supra* note 59, at 442. *But see* Mike Koehler, *Foreign Corrupt Practices Act Continuity in a Transition Year*, 70 S.C. L. REV. 143, 201 (2018) ("[S]tatute of limitations issues are meaningless when, as often occurs, issuers under FCPA scrutiny waive statute of limitations defenses or agree to toll the statute of limitations.").

[193] *Gray Cloud*, *supra* note 109.

[194] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE DETECTION OF FOREIGN BRIBERY 9 (2017), http://www.oecd.org/corruption/the-detection-of-foreign-bribery.htm; *see, e.g.*, Press Release, SEC Halts Alleged Ongoing Offering Fraud Involving Cycling Companies, U.S. Sec. & Exch. Comm'n (July 22, 2021) (available at https://www.sec.gov/news/press-release/2021-136) (describing an offering fraud in which a fraudster raised $11.5 million from at least forty investors).

[195] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 194, at 19–20.

of SEC enforcement trials where corporate leadership may be culpable,[196] the removal of disgorgement from the SEC's toolbox would embolden those companies who are already eager to push back against SEC enforcement actions to do so with increased vigor.[197] To dissuade issuers and their employees from committing acts of bribery abroad, issuers must be incentivized through the threat of disgorgement to keep accurate books and records and to report any violations by wrong-doing employees.[198] If there is no money to be made from acts of bribery because disgorgement exists alongside other applicable civil and criminal penalties, then companies will self-report.[199]

Consider a situation like that of Garth Peterson, the Morgan Stanley banker who bribed a foreign official to secure business for Morgan Stanley while enriching himself and his corrupt counterpart.[200] Obviously, neither Peterson nor the Chinese official he bribed for his and his employer's gain would have incentive to disclose their acts of bribery. Had Morgan Stanley not fully cooperated with the SEC's inquiry to discover Peterson's misconduct, Peterson would have likely gone on enriching himself, his corrupt foreign confederate, and Morgan Stanley itself. Had Morgan Stanley not been disincentivized by the possibility of disgorgement on top of the statutorily-limited civil penalties the SEC could bring to bear, it may have chosen not to have voluntarily disclosed the matter and not fully participated with the SEC inquiry.[201] While executives of issuers will likely still negotiate with the SEC and the Department of Justice,[202] given the possibility of injunctive consequences and even criminal liability, removing the ability to disgorge profits makes violations of the FCPA more likely.[203]

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196 *See* Ben Protess & Matthew Goldstein, *Overruled, Judge Still Left a Mark on S.E.C. Agenda*, N.Y. TIMES (June 4, 2014, 10:58 AM), https://nyti.ms/2irXEdK.

197 *Wall Street Pushes Back on Foreign Bribery Probe*, WALL ST. J. (Apr. 29, 2015, 7:24 PM), https://www.wsj.com/articles/wall-street-pushes-back-on-foreign-bribery-probe-1430349863.

198 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 194, at 27.

199 *See FCPA 101*, *supra* note 15 ("In recent years, the majority of corporate FCPA enforcement actions (and related individual enforcement actions) have resulted from voluntary disclosures.").

200 *See supra* Introduction.

201 *See* Frances Floriano Goins, *Rigorous Compliance Program Supports the "Rogue Employee" Defense to FCPA Liability*, LEXOLOGY (June 6, 2012), https://www.lexology.com/library/detail.aspx?g=153ff381-a439-4940-94da-baf27f06ae42.

202 *See Wall Street Pushes Back on Foreign Bribery Probe*, *supra* note 197.

203 *See* DeLuca, *supra* note 106, at 913.

Further, while there have been both international efforts[204] and efforts by foreign governments to legislate against bribery abroad,[205] such efforts have been implemented in too piecemeal and irregular a fashion to replace the FCPA's strong deterrent effect.[206]

2. *Disgorgement Is Appropriate and Benefits Investors*

Disgorgement is an appropriate remedy for investors under Section 78u(d)(5) because disgorgement benefits investors who have been harmed by a company's failure to maintain accounting standards or an individual employee's actual act of bribery. First, it bears repeating that the act of disgorgement itself does benefit the public at large because it deters violations of the FCPA. Corruption, if allowed to continue, damages the rule of law, harms government legitimacy, and impairs the natural development of less affluent countries.[207] When attributed to American issuers, it damages the credibility of both American businesses and American foreign policy.[208] Yet, the Court made clear in *Liu* that disgorgement must do more than benefit the public at large to be an appropriate or necessary remedy under Section 78u(d)(5).[209] Specifically, the Court made clear that the deterrent effect of "depriving wrongdoers of profits" is not enough to make disgorgement "appropriate or necessary for the benefit of investors."[210] The "remedy must do more."[211]

The aftermath of the Court's ruling in *Kokesh* has revealed that the ability to disgorge profits does more than simply benefit the general public. It specifically benefits those investors who invest in companies that face disgorgement as a consequence of FCPA violations. Recall that *Kokesh*'s labeling of disgorgement as a penalty limited enforcement actions to five years because of statute of

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[204] *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 3 (1998).

[205] *See* DELL, *supra* note 171, at 29–31.

[206] Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Remarks to the Economic Club of New York (Sept. 9, 2019) (transcript available at https://www.sec.gov/news/speech/speech-clayton-2019-09-09) ("[I]n many areas of the world, our work may not be having the desired effect . . . because many other countries, including those that have long had similar offshore anti-corruption laws on their books, do not enforce these laws.").

[207] Steven R. Salbu, *Redeeming Extraterritorial Bribery and Corruption Laws*, 54 AM. BUS. L.J. 641, 642 (2017).

[208] *See* Koehler, *supra* note 14, at 942; *cf.* Brewster, supra *note* 25, at 1626 (arguing Congress and President Carter were concerned that "illicit corporate payments abroad" harmed U.S. relations with other countries).

[209] Liu v. SEC, 140 S. Ct. 1936, 1948 (2020).

[210] *Id.*

[211] *Id.*

limitations restrictions.[212] This ruling severely curtailed the SEC's ability to disgorge profits, particularly in the realm of FCPA enforcements, which often take longer than five years to come to light.[213] The SEC estimated in 2019 that the decision had caused them "to forgo over 1.1 billion dollars in disgorgement," and that as a result they had shifted their resources to investigate violations that offered the highest chance of returning funds to investors.[214] While the erosion of the SEC's ability to disgorge profits after *Kokesh* was bad for the SEC's ability to pursue long-running frauds, it did offer researchers a unique opportunity to conduct an empirical study to analyze the effect of disgorgement on the value of shares of issuers who are subject to securities laws.[215] Researchers looked at the Eleventh Circuit, which had already viewed disgorgement as limited by the statute of limitations, as a control group and compared it to the remaining circuits that had not yet limited disgorgement by the statute of limitations.[216] Conclusively, the researchers found that the erosion of the SEC's ability to disgorge funds had a deleterious effect on shareholder confidence and stock prices.[217] As a result of the *Kokesh* decision, surveyed companies saw an "aggregate loss[] of $33.22 billion."[218] The mere limitation of disgorgement as a tool for enforcement of securities legislation caused severe investor anxiety and indicated disgorgement was a value-adding tool that investors wanted because of its beneficial effects.[219]

B. Disgorgement to the Treasury Aligns with Equitable Principles

While disgorgement is necessary and appropriate to effectuate the purpose of the FCPA and the subsequent additions to it, such as SOX and the Dodd-Frank whistleblower provisions,[220] it is less clear how disgorgement fits in with equitable principles. In part, this is due to the murky nature of the equitable-legal divide.[221] It is also due to the Court's vacillating guidance as to how a court

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212 Kokesh v. SEC, 137 S. Ct. 1635, 1644 (2017).

213 *Gray Cloud*, *supra* note 109.

214 U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT: DIVISION OF ENFORCEMENT 21 (2019), https://www.sec.gov/files/enforcement-annual-report-2019.pdf.

215 Brown et al., *supra* note 188, at 2–4.

216 *Id.* at 4.

217 *Id.* at 24–26.

218 *Id.* at 3.

219 *Id.* at 30.

220 *See* Nagy, *supra* note 179, at 919.

221 Gabaldon, *supra* note 102, at 1615 (arguing that "a sea of unexamined assumptions about 'equity'" has led to confusion). *But cf.* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1001 (2015) (arguing "the Court has constructed an idealized history of equity that is well suited to judicial decisionmaking").

should discern whether a remedy is equitable.[222] This section asserts that despite the murky context, FCPA disgorgement does align with equitable principles identified by the Court in *Liu*.

First, disgorgement is an equitable measure because it adheres to the principle that courts are allowed in equity "to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy."[223] In *Liu*, eight Supreme Court justices, excluding Justice Thomas, agreed with the commonsense idea that the name of a remedy mattered less than what it effectively did.[224] In other words, that FCPA disgorgement actions strip individuals and corporations of their ill-gotten gains fits squarely within the definition of equitable principles.[225]

Second, FCPA disgorgement is equitable despite the Court's finding that "to avoid transforming an equitable remedy into a punitive sanction, courts restrict[] the remedy . . . to be awarded for victims."[226] Since FCPA disgorgement returns money to the Treasury rather than awarding the remedy to victims, it might seem the Court is signaling to lower courts that FCPA disgorgement is not equitable. However, because the Court also indicated that "[t]he equitable nature of the profits remedy *generally* requires the SEC to return a defendant's gains to wronged investors for their benefit," the Court left open the possibility that *some* disgorgement to the Treasury could be equitable.[227]

Although debatable,[228] the Court held that a punitive remedy cannot be equitable.[229] To determine whether a remedy is equitable rather than punitive, the lower courts could employ two distinct methods indicated in Supreme Court precedent.[230] The first method requires a historic survey like the Court conducted in *Grupo*, in which lower courts should look to the English Court of Chancery to see if, at the time of the Judiciary Act of 1789, those courts had the ability to pursue the particular remedy in question.[231] If one employs this approach in the

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222 *See* Bray, *supra* note 221, at 999–1001.

223 Liu v. SEC, 140 S. Ct. 1936, 1942 (2020).

224 *See id.* at 1942–43.

225 *See* RESTATEMENT, *supra* note 10, at §§ 51(3)–(4).

226 *Liu*, 140 S. Ct. at 1942.

227 *Id.* at 1948 (emphasis added).

228 Gabaldon, *supra* note 102, at 1649–50 (discussing "the '[p]ower of a court of equity to inflict punishment'"); *see* HENRY HOME, LORD KAMES, PRINCIPLES OF EQUITY 263 (Michael Lobban ed., 3d ed. 2014) (1760).

229 *See Liu*, 140 S. Ct. at 1941, 1949–50.

230 Gabaldon, *supra* note 102, at 1614–15.

231 Grupo Mexicano de Desarrollo v. All. Bond Fund, 527 U.S. 308, 327, 332 (1999).

rigidly formalistic way that the majority did in *Grupo*,[232] it is difficult to see how FCPA disgorgement is an equitable remedy. Justice Thomas followed the rigidly formalistic, historic approach of the *Grupo* majority in his dissent in *Liu* and argued that because the word "disgorgement" was not used prior to 1789, it should have been disallowed completely as an equitable remedy.[233] Justice Thomas asserted that, even if one allowed disgorgement generally, disgorgement certainly is not equitable when money is not returned to wronged victims, like when the SEC disgorges ill-gotten gains from FCPA violators.[234] However, at least one circuit court has used this approach relying on pre-1789 sources in a less textualist manner and held that disgorgement generally is equitable because its central purpose is to prevent unjust enrichment.[235] So while there may be no analogous cases in which the government seized money from wrongdoers with the specific intention of placing it in government coffers,[236] the emphasis that eighteenth-century writers, such as Lord Kames, placed on equity's purpose of preventing ill-gotten gains[237] should lead more functionalist courts to find that SEC FCPA disgorgement is sufficiently analogous to historic remedies to pass muster.[238]

The second approach for analyzing equitable measures, as embraced in post-*Grupo* holdings by the Supreme Court, indicates that even staunch originalists are willing to discard reliance on pre-1789 sources to analyze the equitable nature of a remedy.[239] While Justice Thomas[240] stood up for the *Grupo* approach in *Liu* and argued that disgorgement should be analyzed by how courts in 1789 would view the measure,[241] the majority in *Liu* eschewed reliance on pre-1789

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[232] *Id.* at 332 ("[T]he equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence.").

[233] *Liu*, 140 S. Ct. at 1951 (Thomas, J., dissenting).

[234] *Id.* at 1956 ("Requiring the SEC to only 'generally' compensate victims . . . is inconsistent with traditional equitable principles.").

[235] SEC v. Cavanagh, 445 F.3d 105, 118 (2d Cir. 2006) ("Commentators have observed that courts of equity now have, and have had for centuries, jurisdiction over claims arising from improper acquisition of assets.").

[236] *Liu*, 140 S. Ct. at 1955–56 (Thomas, J., dissenting).

[237] *See* Gabaldon, *supra* note 102, at 1657–58.

[238] *See* Grupo Mexicano de Desarrollo v. All. Bond Fund, 527 U.S. 308, 336 (1999) (Ginsburg, J., dissenting) ("From the beginning, we have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England . . . [W]e have never limited the federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor.").

[239] *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 217 (2002) (explaining that consulting current works should "make the answer clear" as to whether a remedy is equitable).

[240] *See* Michael O'Donnell, *Deconstructing Clarence Thomas*, THE ATLANTIC, Sept. 2019, at 39, 39–41, https://www.theatlantic.com/magazine/archive/2019/09/deconstructing-clarence-thomas/594775/.

[241] *Liu*, 140 S. Ct. at 1951 (Thomas, J., dissenting).

sources and looked to modern restatements on equity for guidance.[242] This approach had been approved by Justice Scalia himself in the 2002 *Great-West & Annuity Insurance Co. v. Knudson* decision.[243] This more flexible second approach allows courts to analyze statutes based on the understanding of equity at the time they were written, rather than analyzing equity frozen in time at the moment of the nation's founding.[244] As has been stated by Justice Barrett, the most recent textualist justice appointed to the Supreme Court, "the judge approaches the text as it was written, with the meaning it had at the time."[245] Interpreting a statute written in 2002 in the way legislators at the time would have understood it is a more appropriate approach than peering back in time to 1789.[246] If the lower courts use this approach rather than imitating historians,[247] then they will find it even easier to hold that FCPA disgorgement is equitable.

In *Great-West*, the Court held that Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA), which allowed, in part, a civil action to "obtain other appropriate equitable relief," did not include judicially-decreed reimbursement for payments made to a beneficiary of an insurance plan by a third party because it was not equitable relief.[248] In a 5-4 decision, Justice Scalia's majority held that this action was a legal remedy and therefore not equitable.[249] Although this analysis still relied on a historical analysis of the Court's equitable powers, the Court did not perform an "antiquarian inquiry" that relied on pre-constitutional cases from the English Court of Chancery like it had done in *Grupo*.[250] Here, the Court instead looked to modern sources such as restatements and treatises for guidance.[251] The majority argued these modern sources showed that restitutionary measures that sought to impose liability on

[242] *Id.* at 1943 (majority opinion).

[243] 534 U.S. at 217.

[244] Even a textualist who opposes the use of legislative history to discover congressional intent could accept the use of contemporary sources to discern congressional meaning. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988) ("Meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem."); Gabaldon, *supra* note 102, at 1658 ("[W]hen one is deriving the meaning of modern statutes it is more appropriate to rely on Professor Dan Dobbs than on Lord Kames.").

[245] Brian Naylor, *Barrett, An Originalist, Says Meaning of Constitution 'Doesn't Change Over Time,'* NPR (Oct. 13, 2020, 10:08 AM), https://www.npr.org/923215778.

[246] *See* Bray, *supra* note 221, at 1012 ("[I]t is difficult to make 1789 bear the weight of being an originalist year for the enactment of equitable doctrines."); *cf.* Union Pac. Ry. Co. v. Chi., Rock Island & Pac. Ry. Co., 163 U.S. 564, 600–01 (1896) (noting the expansion of equitable remedies).

[247] *See* MAX RADIN, LAW AS LOGIC AND EXPERIENCE 138 (2000) ("[L]awyers are . . . extremely bad historians.").

[248] *Great-West*, 534 U.S. at 209–10 (citations omitted).

[249] *Id.* at 220–21.

[250] *Id.* at 217.

[251] *Id.* at 212–13.

the defendant were legal, whereas those that sought "to restore to the plaintiff particular funds or property in the defendant's possession" were equitable.[252]

While on its face this decision seems to imply that restitutionary measures such as disgorgement that address unjust enrichment—as in the FCPA cases—would be legal remedies rather than equitable ones, Justice Scalia also noted in a footnote that restitutionary remedies could address unjust enrichment when it involves breaches of fiduciary duties.[253] The Supreme Court's holding in *Liu* that disgorgement is not limited to breaches of fiduciary duty,[254] taken alongside Justice Scalia's footnote in *Great-West*, implies that the breadth of equitable remedies is larger when it seeks to disgorge the illicit profits obtained by those who breach their fiduciary duties.[255] Importantly, FCPA violations of both the anti-bribery provisions and the books and records provisions often involve violations of fiduciary duties.[256] For example, in the Peterson case, both Peterson and Morgan Stanley owed fiduciary duties to their clients.[257] Those duties were breached by Peterson through his acts of bribery and misappropriation,[258] and arguably would have been breached by Morgan Stanley had the threat of disgorgement and concomitant penalties not incentivized the company to establish strong internal controls.[259] Further, the idea that wrongdoers and those who breach fiduciary duties should be deprived of their ill-gotten gains squares with the current Restatement of the Law, the exact type of source used in *Great-West* and cited approvingly in *Liu*.[260] The Restatement (Third) of Restitution and Unjust Enrichment specifically signals that eliminating the possibility of profit by "a conscious wrongdoer, or . . . a defaulting fiduciary"[261] is "one of the cornerstones of the law of restitution and unjust enrichment."[262]

Admittedly, even though the presence of a breach of fiduciary duties broadens the availability of the equitable remedy, as this Comment argues, such

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[252] *Id.* at 214.

[253] *Id.* at 214 n.2.

[254] Liu v. SEC, 140 S. Ct. 1936, 1944 (2020).

[255] *See* Gabaldon, *supra* note 102, at 1656.

[256] *See* Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 AM. U. BUS. L. REV. 391, 434–37 (2014).

[257] Complaint at 2–3, SEC v. Peterson, 2012 WL 1440462 (E.D.N.Y. Apr. 25, 2012) (No. 12CV 02033).

[258] *Id.* at 2.

[259] *See* RESOURCE GUIDE, *supra* note 39, at 43 (describing a situation in which a company failed to have adequate controls over employees in China who committed acts of bribery and was forced to pay $1.15 million in disgorgement).

[260] *See* Liu v. SEC, 140 S. Ct. 1936, 1943, 1950 (2020). *But see id*. at 1953 (Thomas, J., dissenting) ("The inclusion of 'disgorgement' in the Third Restatement . . . represents a 'novel extension' of equity." (citation omitted)).

[261] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(4) (AM. L. INST. 2010).

[262] *Id.* § 51 cmt. e.

circumstances alone may still not be enough to overcome the Court's hesitation to grant the SEC disgorgement when some of the money disgorged is to be returned to the Treasury.[263] However, in addition to the broadening effect that breaches of fiduciary duties have on what can be considered equitable, the Court has signaled that equitable remedies can also be broadened when they are used to address a public wrong rather than a private wrong. This is particularly pertinent in the context of violations of the FCPA, as the Act does not provide for a private right of action.[264] While both *Grupo* and *Great-West* looked at the availability of equitable measures generally, neither looked at disgorgement specifically, and both analyzed efforts to enforce equitable remedies through private causes of action.[265] Accordingly, these precedents "are only tangentially relevant to the issue of court-ordered disgorgement in SEC enforcement actions."[266] In the context of securities violations that allow for private causes of action, *Liu*'s finding that equitable measures should *generally* return money to wronged investors makes sense.[267] Those injured by securities fraud should receive the money that the wrongdoer secured, if possible. For example, when investors are defrauded, the investors often stand ready to bring suit to ensure that the wrongdoer does not benefit from his ill-gotten gains,[268] even if the SEC or another enforcement agency does not bring suit.[269] These disgorged funds should be returned to the victims, who had their own private right of action, instead of the government. However, when the SEC seeks disgorgement to enforce a public right, as in an FCPA case where there is no private cause of action, sending money to the Treasury is equitable because it serves the purpose of depriving a wrongdoer of her ill-gotten gains.[270]

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263 *See Liu*, 140 S. Ct. at 1942 (noting the limited equitable rewards to be awarded to victims).

264 *See* Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1024 (6th Cir. 1990) ("[W]e find that no private right of action is available under the Foreign Corrupt Practices Act."); Republic of Iraq v. ABB AG, 768 F.3d 145, 169–70 (2d Cir. 2014).

265 In *Grupo*, the request for restitution as an equitable remedy was brought by a private investment fund for a breach of contract issue. Grupo Mexicano de Desarrollo v. All. Bond Fund, 527 U.S. 308, 310, 312 (1999). In *Great-West*, an insurance company sued for an injunction for a money judgment, which the Court viewed as a breach of contract issue. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 208, 213 (2002).

266 Nagy, *supra* note 179, at 921.

267 *Liu*, 140 S. Ct. at 1948.

268 *See, e.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 378, 380 (1983) (holding that defrauded investors' private right of action under the 1934 Act "is simply beyond peradventure").

269 Private litigants, however, are less successful than the SEC in recovering losses. *See* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 373 (2015).

270 *See Liu*, 140 S. Ct. at 1942.

In *Porter v. Warner Holding Co.*, the Court held that restitution was equitable when it came to the enforcement of public rights.[271] *Porter*, which was cited approvingly in both *Kokesh*[272] and *Liu*,[273] looked at the powers of equity available to federal courts generally and held that it was "readily apparent" that a district court had the power to compel one to "disgorge profits" acquired in violation of a federal statute.[274] That "the public interest is involved" meant a court's exercise of its inherent equitable powers "assume[d] an even broader and more flexible character than when only a private controversy is at stake."[275] Like the need to disgorge the profits of FCPA violators addressed in this Comment, the *Porter* Court viewed the deterrent effect of disgorging the wrongdoer of ill-gotten gains as "appropriate and necessary" to effectuating that public interest.[276]

Just five years before *Liu*, in *Kansas v. Nebraska*, the Supreme Court approvingly cited *Porter*'s proposition that a court's inherent equitable powers were "broader and more flexible" when a public interest was involved.[277] In *Kansas v. Nebraska*, Kansas and Nebraska had an interstate compact that set limitations on how much water each state could draw from the Republican River Basin, which Nebraska violated by pumping excess groundwater.[278] This exposed Kansas to a risk of diminished water levels, and the state brought suit.[279]

Like in *Great-West*, the Court avoided reliance on antiquarian case law from 1789 and instead turned to modern restatements for guidance on what was equitable.[280] Justice Kagan's five-justice majority held that Nebraska's upstream access to the river meant that, without judicial intervention, it would be able to appropriate all the water before it made its way into Kansas.[281] The Court addressed this issue as if it were one of unjust enrichment, ordering

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[271] 328 U.S. 395, 398–99 (1946).

[272] Kokesh v. SEC, 137 S. Ct. 1635, 1644 (2017).

[273] Liu v. SEC, 140 S. Ct. 1936, 1943 (2020) (citing *Porter* for the proposition that the disgorgement of profits is equitable).

[274] *Porter*, 328 U.S. at 398–99.

[275] *Id.* at 398.

[276] *Id.* at 400 ("[A] restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains . . . .").

[277] Kansas v. Nebraska, 574 U.S. 445, 456 (2015) (quoting *Porter*, 328 U.S. at 398).

[278] *Id.* at 451–52.

[279] *Id.* at 452.

[280] *Id.* at 455. *But cf. id.* at 475 (Scalia, J., dissenting) (arguing modern restatements must be "used with caution").

[281] *Id.* at 454 (majority opinion) (holding that judicial power was the "only means left" for stopping the inequitable taking of the water (quoting Kansas v. Colorado, 185 U.S. 125, 144 (1902))).

disgorgement not because of any actual losses that Kansas had suffered but instead because "compelling Nebraska to disgorge profits deter[red] it from taking advantage of its upstream position."[282] Chief Justice Roberts concurred that the Court had equitable power to order disgorgement.[283] Further, Justice Thomas, who would decry the nature of disgorgement as equitable when disgorgement enforced private rights in *Liu*,[284] allowed it here as an equitable remedy.[285] Since this section of Justice Thomas's opinion was joined by Justices Scalia and Alito, all the Justices involved in the *Kansas* decision viewed disgorgement as equitable when a federal interest was at stake.[286]

Kansas v. Nebraska, as it relates to FCPA disgorgement, is important for two reasons. First, it demonstrates that there is a difference in how the Court views the equitable powers of the Court when it seeks to enforce a public right as compared to a private right.[287] Every justice on the *Kansas v. Nebraska* Court appeared to agree that the presence of a public interest meant disgorgement was equitable.[288] Second, the rationale behind the need for disgorgement in an FCPA case is strikingly similar to the rationale behind the need for disgorgement in *Kansas v. Nebraska*. To deter a wrongdoer from taking advantage of their "upstream position" to secure wealth at the cost of their rivals, courts have the power to disgorge the profits of the wrongdoer. As long as the disgorgement granted by a court complies with the limitations identified in *Liu*, such as individual liability for wrongful profits and deduction of legitimate expenses,[289] it would still be the type of equitable remedy allowed by the *Porter* and *Kansas v. Nebraska* decisions, notwithstanding the ultimate destination of the disgorged funds. While disgorgement would still be a deterrent, it would not be punitive such that it would transform from an equitable measure into a legal remedy and thus fall outside the scope of the court's equitable powers.[290]

Finally, disgorging money to the Treasury for FCPA violations does not prevent victims from recovering a fraudster's ill-gotten gains. Essentially, this

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282 *Id.* at 475. The Court further reasoned that if they were to only award actual damages it would allow Nebraska "'to ignore its obligation to deliver water as long as it is willing' to pay that amount." *Id.* at 463 (quoting Texas v. New Mexico, 482 U.S. 124, 132 (1987)).

283 *Id.* at 475 (Roberts, C.J., concurring in part and dissenting in part).

284 Liu v. SEC, 140 S. Ct. 1936, 1956 (2020) (Thomas, J., dissenting).

285 *See Kansas v. Nebraska*, 574 U.S. at 485 (Thomas, J., concurring in part and dissenting in part) (likening disgorgement to other kinds of equitable power).

286 Gabaldon, *supra* note 102, at 1660.

287 *Id.* ("[T]here is a clear and continuing tonal difference between the Court's public interest equitable remedy cases and its private interest equitable remedy cases . . . .").

288 *See id.*

289 *Liu*, 140 S. Ct. at 1949–50.

290 *See id.* at 1944.

negates one of Justice Thomas's main concerns in *Liu*. Justice Thomas posited that allowing disgorgement to go to the Treasury in cases such as *Liu*, where a fraudster had actually defrauded identifiable victims, would mean that there would be no money left for the actual victims of the fraud.[291] He complained that the majority's requirement that the SEC should only "'generally' compensate victims" left the lower courts with "almost no guidance . . . about how to resolve this question on remand."[292] He further lamented that the Court "should at least do more to identify the circumstances in which the government may keep the money."[293] One such circumstance is in the context of FCPA disgorgement. While this Comment contends that there are indeed victims of FCPA violations, such as investors and rival companies,[294] there are not specific identifiable investors to whom money can be returned.[295] Because no private cause of action for FCPA violations exists (as in a 10b-5 cause of action),[296] disgorging money from wrongdoers to the Treasury does not threaten to deplete a wrongdoer of funds in a way that would deprive private litigants from recovering that money.

Moving forward, lower courts should view FCPA disgorgement actions by the SEC as fulfilling the requirements laid out by the Supreme Court in *Liu*. They are appropriate *and* necessary for the benefit of investors. The ability to disgorge profits is *necessary* for the SEC to effectuate the purposes of an amalgamation of statutes aimed at preventing wrongdoers from committing acts of bribery and books and record violations that threaten the entire functioning of the financial system. That the U.S. enforcement agencies largely act alone to detect and deter these acts of bribery makes the presence of an effective deterrent like disgorgement particularly important.

Further, the ability to disgorge profits is *appropriate*. In addition to the general idea that battling the pernicious effect of corruption has a positive effect on the general public by improving the rule of law, government legitimacy, the development of affluent countries, and the credibility of American issuers, it also benefits the specific investors who have purchased shares from these issuers.

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291 *Id.* at 1954 (Thomas, J., dissenting) ("[T]he imposition of over $26 million in disgorgement and approximately $8 million in civil monetary penalties . . . ensure[s] that victims will be unable to recover anything in their own actions.").

292 *Id.* at 1956.

293 *Id.*

294 *See supra* notes 170, 215.

295 *See* Transcript of Oral Argument, *supra* note 161, at 34 (stating that if the money goes to the Treasury, then "we don't really know if it's being used to help investors").

296 Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983) (stating that a private right of action under § 10(b) "has been consistently recognized for more than 35 years").

The effect the *Kokesh* decision had on the SEC's ability to disgorge funds showed that limiting this remedy harmed the interests of those specific investors who have purchased shares from these issuers.

In addition to being both appropriate and necessary, disgorging funds for violations of the FCPA aligns with equitable principles, whether the lower courts look back to the English Court of Chancery or, more prudently, to modern restatements and writings on equity. Both types of sources demonstrate that one of the central principles of equity is stripping wrongdoers of their ill-gotten gains. Further, Supreme Court precedent shows support for the proposition that the equitable powers of the federal courts are broadened when breaches of fiduciary duties are involved and when the court is seeking to enforce a public right.[297] Both phenomena are present in a case of a FCPA violation leading to disgorgement. Finally, while the principles of equity *generally* require that funds be returned to victims, the fact that FCPA disgorgement efforts do not threaten to deprive wrongdoers of funds that might otherwise go to victims in a private cause of action is strong support for allowing the SEC to continue to disgorge these funds from wrongdoers. To hold otherwise would threaten the entire purpose for which Congress passed the FCPA, SOX, Dodd-Frank, and litany of other related securities legislation.

Despite the argument made in this section that the lower courts can disgorge profits as an equitable remedy in FCPA actions, there is considerable uncertainty about what the lower courts will do.[298] This uncertainty is further compounded by post-*Liu* changes to Section 78u(d), which, while expressly granting the SEC the power to disgorge profits and raising the statute of limitations in some instances, have an uncertain and uneven application for FCPA enforcement actions. The uncertainty caused by these revisions means that the SEC may need to continue to justify disgorgement to the Treasury in some, or even all, instances. These changes and their implications are discussed in Part IV below.

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297 *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214 n.2 (2002); Porter v. Warner Holding Co., 328 U.S. 395, 403 (1946).

298 *Compare Liu*, 140 S. Ct. at 1956 (Thomas, J., dissenting) ("[T]his uncertainty is sure to create opportunities for the SEC to continue exercising unlawful power."), *with* Kyle DeYoung, Lex Urban & Wesley Wintermyer, *An Analysis of the Supreme Court's Decision in* Liu v. SEC, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 4, 2020), https://corpgov.law.harvard.edu/2020/07/04/an-analysis-of-the-supreme-courts-decision-in-liu-v-sec (arguing that unless the SEC can "justify sending disgorged funds to the Treasury," it "would undoubtedly reduce the amount of disgorgement the agency is able to obtain in future enforcement actions").

IV. CONGRESS'S GRANT OF EXPRESS AUTHORITY TO DISGORGE CREATES NEW QUESTIONS

The limitations imposed on the SEC by the Court's *Kokesh* and *Liu* decisions had huge impacts on the SEC's ability to disgorge funds and, by extension, to protect investors. In 2019, SEC Chairman Jay Clayton warned that the limitations imposed by *Kokesh*'s statute of limitations requirement "may cause the Commission to forgo up to approximately $900 million in disgorgement in filed cases, of which a substantial amount potentially could have been returned to retail investors."[299] *Kokesh* limited the SEC's ability to rectify "long-running, well-concealed frauds," and Clayton "welcome[ed] the opportunity to work with Congress to address this gap in investor protection."[300] The House of Representatives soon thereafter approved a bill that would have expressly granted the SEC the ability to disgorge funds and increased the statute of limitations for these enforcement actions to fourteen years.[301] Because the bill never made it out of the Senate,[302] the statute of limitations for disgorgement actions remained at five years at the time of *Liu*'s imposition of further limitations on the SEC's ability to disgorge funds as an equitable remedy.[303] Following *Liu*, Clayton again requested Congress's help, emphasizing that disgorgement "is one of the Commission's most important tools" and stressing that "more than $1 billion in ill-gotten gains" had escaped the SEC's reach since the *Kokesh* decision.[304]

In the waning days of 2020, Congress finally came to the rescue. Congress modified the language of Section 78u to expressly grant the SEC the power to disgorge funds and raised the statute of limitations to ten years for some—but crucially not all—violations of securities laws.[305] The modifications to the SEC's powers, buried on page 1,328 of the unexpectedly politically

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[299] Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Keynote Remarks at the Mid-Atlantic Regional Conference (June 4, 2019) (transcript available at https://www.sec.gov/news/speech/clayton-keynote-mid-atlantic-regional-conference-2019).

[300] *Id.*

[301] Investor Protection and Capital Markets Fairness Act, H.R. 4344, 116th Cong. § 2 (2019).

[302] Securities Fraud Enforcement and Investor Compensation Act of 2019, S. 799, 116th Cong.

[303] *See Liu*, 140 S. Ct. at 1949–50 (explaining how joint and several liability and inclusion of legitimate business expenses could transform an equitable remedy into a punitive one).

[304] Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Testimony on "Oversight of the Securities and Exchange Commission" Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (Nov. 17, 2020) (transcript available at https://www.banking.senate.gov/imo/media/doc/Clayton%20Testimony%2011-17-202.pdf).

[305] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. § 6501(C)(3) (2020) (enacted).

contentious[306] $740.5 billion National Defense Authorization Act (NDAA), arguably frees the SEC from the limitations imposed by *Kokesh* and *Liu*.[307] However, because of the murky language of the bill and the even murkier presence of scienter as an element to be proved in FCPA actions, courts will continue to have a difficult time setting the boundaries for the SEC's power. Section A of this Part explains how the legislation altered the SEC's ability to disgorge profits and how the statute of limitations applies. This section identifies questions raised by these provisions that courts will need to address, particularly as they apply to FCPA enforcement actions. Section B discusses what changes should be included in subsequent revisions to the statute, and argues that the best way of ensuring that SEC enforcement efforts are not overly onerous to suspected wrongdoers is not through the imposition of a short statute of limitations, but rather through sufficient funding of the SEC. This should be done by allowing the agency to fund itself through disgorgement rather than rely on congressional appropriations.

A. How the NDAA Alters Section 78u(d)

The NDAA made two significant changes to Section 78u(d) that are of importance to the SEC's ability to disgorge funds from those who commit violations of the FCPA. First, Section 6501 of the NDAA expressly gives the SEC the ability to disgorge funds from wrongdoers.[308] This express authority to disgorge should be interpreted to allow courts to grant disgorgement free of the limitations imposed by the Court in *Liu*. This will be discussed in Subsection One below. Second, Section 6501 dictates the exact statute of limitations requirements for violations of specific provisions of the act or for violations of securities laws that have a specific element that must be proven.[309] As a result of these changes, whether the SEC has five years or ten years to disgorge funds is dictated by the type of securities law violation that has occurred.[310] This provision will lead to new legal challenges because it does not explicitly point to the FCPA as a provision entitled to a ten-year statute of limitations, and the

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306 President Trump vetoed the bill because it changed the names of military sites named after Confederates and it did not repeal language protecting social media companies' liability protections. The support for the bill was so strong that Congress overrode the veto, the only time an override happened in Trump's presidency. *See* Catie Edmondson, *Senate Overrides Trump's Veto of Defense Bill, Dealing a Legislative Blow*, N.Y. TIMES (Jan. 1, 2021), https://nyti.ms/3o8jSAL.

307 *See Congress Buries Expansion of SEC Disgorgement Authority in Annual Defense Budget*, GIBSON DUNN (Dec. 18, 2020), https://www.gibsondunn.com/congress-buries-expansion-of-sec-disgorgement-authority-in-annual-defense-budget/.

308 William M. (Mac) Thornberry National Defense Authorization Act § 6501(a)(1)(A).

309 *Id.*

310 *Id.*

existence of scienter as an element in FCPA actions is variable and uncertain. These changes are discussed in Subsection Two below.

1. *Section 78u(d) Now Allows the SEC to Disgorge Funds Which May Free It of* Liu*'s Restrictions*

In *Liu*, the SEC argued that Congress, aware that the SEC had been disgorging funds as an equitable measure since the time of *Texas Gulf*, impliedly meant to allow the agency to continue using this remedy by including the phrase "any equitable relief" in Section 78u(d)(5).[311] As discussed above,[312] the Supreme Court soundly rejected the idea, reasoning that because the statute referenced "a remedy grounded in equity," the disgorgement remedy must have been available in courts of equity and must contain the limitations "that equity typically imposes."[313] Section 6501 of the NDAA quickly and expressly made clear that whatever Congress's position was prior to the *Liu* decision about whether the SEC could seek and courts could grant disgorgement, Congress certainly condoned the practice now.

First, the title of Section 78u(d)(3) was changed from "Money penalties in civil actions" to "Civil money penalties and authority to grant disgorgement."[314] Importantly, the bill added a new provision—paragraph (7).[315] This paragraph reads as follows: "In any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement."[316] The bill also explicitly granted courts jurisdiction to "require disgorgement under paragraph (7) of any unjust enrichment by the person who received such unjust enrichment as a result of such violation."[317] While the Supreme Court in *Liu* held that disgorgement would be allowed as an equitable remedy,[318] albeit with some limitations, the SEC can now point to express statutory authority to disgorge funds from those who unjustly enriched themselves through violations of securities laws such as

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[311] *See* Brief for Respondent, *supra* note 153, at 10 (arguing that given Congress's subsequent enactment of "five separate statutes that referred to or relied on the availability of disgorgement in civil suits brought by the SEC," "it is implausible to suggest that the sweeping phrase 'any equitable relief' was intended to *withhold* the equitable remedy of disgorgement").

[312] *See supra* Part II.C.

[313] *Liu*, 140 S. Ct. at 1947.

[314] William M. (Mac) Thornberry National Defense Authorization Act § 6501(a)(1)(A) (i)–(ii).

[315] *Id.* § 6501(a)(3).

[316] *Id.*

[317] *Id.* § 6501(a)(1)(B)(ii). The new statute also explained that these funds could not be used to pay attorney fees. *See id.* § 6501(a)(2) (changing § 78u(d)(4) to include funds disgorged under the new § 78u(d)(7) provision).

[318] *See Liu*, 140 S. Ct. at 1940 (holding "that a disgorgement award that does not exceed a wrongdoer's net profits . . . is equitable relief permissible under § 78(d)(5)").

the FCPA. Whether this express authority frees the SEC from the limitations on disgorgement imposed by the *Liu* decision is an open question.[319]

Although the legislative changes to Section 78u(d) expressly allowing disgorgement are better than leaving it to the lower courts to determine when it is "appropriate or necessary" for the SEC to disgorge funds from wrongdoers, the way in which the statute was drafted invites new headaches for the SEC and lower courts. A crucial question to be answered is whether the express grant of authority to disgorge means the SEC no longer has to abide by the constraints placed on this remedy by the Supreme Court's *Liu* holding.[320] Recall that when the SEC pursued disgorgement under Section 78u(d)(5) as "equitable relief that may be appropriate or necessary for the benefit of investors,"[321] the central holding of *Liu* was that the SEC had to abide by equitable principles to avoid transforming the remedy into a penalty.[322] Under *Liu*, it would be equitable to deprive a wrongdoer of their unjust enrichment, but it would not be equitable to find them to be jointly and severally liable for the profits of another wrongdoer.[323] It would be equitable to deprive them of their profits, but, in doing so, legitimate expenses must be deducted from the disgorgement penalty.[324] Finally and most importantly for FCPA actions, the Court suggested that it might not be equitable if the disgorged profits were sent to the Treasury rather than to victims.[325]

The new language grants the SEC express authority to disgorge profits but does not clarify whether the SEC is free from the limitations imposed by the *Liu* decision.[326] On the one hand, the SEC is likely to be emboldened by the express permission to disgorge profits from those who unjustly enrich themselves.[327]

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319 *See Congress Buries Expansion of SEC Disgorgement Authority in Annual Defense Budget*, *supra* note 307 (stating it is unclear whether courts would "eschew the equitable limitations placed on disgorgement in *Liu*").

320 *See Liu*, 140 S. Ct. at 1940.

321 15 U.S.C. § 78u(d)(5) (2018).

322 *See Liu*, 140 S. Ct. at 1942; *see supra* Part II.C.

323 *See Liu*, 140 S. Ct. at 1945.

324 *See id.* at 1945–46.

325 *See id.* at 1947–48.

326 *See Congress Buries Expansion of SEC Disgorgement Authority in Annual Defense Budget*, *supra* note 307 ("If Congress . . . wanted to free the SEC from all equitable limitations identified in *Liu*, it could have said so explicitly."); Matthias Kleinsasser & Toby M. Galloway, *Four Things You Need to Know About the Extended Limitations Period for SEC Disgorgement*, NAT'L L. REV. (Jan. 6, 2021), https://www.natlawreview.com/article/four-things-you-need-to-know-about-extended-limitations-period-sec-disgorgement ("Do *Liu*'s restrictions on disgorgement still apply? The safer position is yes, but expect to see litigation over this issue as well.").

327 *See* Kevin R. Edgar, Teresa Goody Guillén, Bari R. Nadworny & Michelle N. Tanney, *Congress Gives*

The Commission will likely argue that the addition of Section 78u(d)(7) in a paragraph separate from the equitable remedies of Section 78u(d)(5) means the disgorgement remedy is no longer an equitable one, and therefore does not have to abide by those limitations.[328] The express change to Section 78u(d)(3)(A) granting district courts the jurisdiction to require disgorgement "of any unjust enrichment *by the person* who received such unjust enrichment"[329] implies that Congress meant to follow *Liu*'s lead in prohibiting joint and several liability.[330] Similarly, the exclusion of the phrase "for the benefit of investors" from Section 78u(d)(7)'s express granting of disgorgement powers could be read to allow disgorged moneys to go to the Treasury, as in the case of FCPA violations.[331] On the other hand, the bill could be interpreted to not "explicitly undercut any of the limitations that the Court imposed in *Liu*."[332] This uncertainty is further compounded by the fact that the new provisions do not explicitly define disgorgement,[333] once again leaving it to the courts to determine what this term actually means.[334] Because FCPA disgorgement awards are sent to the Treasury rather than to wronged investors,[335] whether these new provisions shed the limitations imposed by the *Liu* decision is crucial.

Despite the uncertainty, courts should interpret the new Section 78u(d)(7) provision to allow the SEC to disgorge funds to the Treasury in FCPA actions. *Liu* was a source of congressional discontent and influenced the creation of these

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SEC Game-Changing 10-Year Statute of Limitations for Disgorgement and Statutory Authority to Obtain Disgorgement in Federal Court, BAKERHOSTETLER (Dec. 12, 2020), https://www.bakerlaw.com/alerts/congress-gives-sec-game-changing-10-year-statute-of-limitations-for-disgorgement-and-statutory-authority-to-obtain-disgorgement-in-federal-court ("The NDAA . . . will override doubts as to the Commission's ability to go after wrongdoers' ill-gotten gains."); *see also Congress Buries Expansion of SEC Disgorgement Authority in Annual Defense Budget*, *supra* note 307 ("If enacted, the NDAA will likely embolden the SEC on numerous levels.").

328 *See Defense Bill to Expand SEC Powers and Authority*, JONES DAY: INSIGHTS (Dec. 2020), https://www.jonesday.com/en/insights/2020/12/defense-bill-to-expand-sec-powers-and-authority.

329 15 U.S.C. § 78u(d)(3)(A) (2018) (emphasis added).

330 *Defense Bill to Expand SEC Powers and Authority*, *supra* note 328.

331 *Id.* (arguing for the removal of nullified questions surrounding the SEC's distribution of disgorgement awards to the U.S. Treasury "for the benefit of investors").

332 *Congress Seeks to Amend Securities Laws on Disgorgement*, KRAMER LEVIN (Dec. 22, 2020), https://www.kramerlevin.com/en/perspectives-search/congress-proposes-to-amend-securities-laws-to-underscore-availability-of-disgorgement-in-sec-federal-court-actions-and-to-extend-limitations-period-for-disgorgement-in-fraud-actions-to-10-years.html.

333 15 U.S.C. § 78u(d)(4) (2018).

334 The Court in *Liu* pointed to possible definitions, including "[r]estitution measured by the defendant's wrongful gain" or an "[a]ccounting hold[ing] the defendant liable for his profits." Liu v. SEC, 140 S. Ct. 1936, 1943 (2020) (citations omitted). *But see id.* at 1953 (Thomas, J., dissenting) ("The term disgorgement itself invites abuse because it is a word with no fixed meaning.").

335 *See* Transcript of Oral Argument, *supra* note 161, at 34–35.

new provisions.[336] Committee discussion about a prior version of Section 6501[337] shows that Congress intended to restore to the SEC its pre-*Liu* disgorgement tools,[338] which had been used frequently in high publicity FCPA actions.[339] By specifically and expressly granting the power to disgorge profits for violations of securities laws, Congress meant to free this remedy from "the limitations upon its availability that equity typically imposes."[340] While the Court in *Liu* rejected the notion that subsequent changes to securities law could "legislative[ly] reenact[]"[341] the disgorgement remedy to be broader than equity allowed,[342] the quick and clear response of Congress to the *Liu* holding, as well as the omission from Section 78u(d)(7) of any mention of equity or "benefit of investors," should free the SEC from these limitations. Furthermore, this Comment argues that, even if the courts were to view disgorgement as beholden by the limitations of equity, disgorgement to the Treasury in FCPA actions is both "appropriate and necessary"[343] and consistent with equitable principles.[344] Therefore, such disgorgement should still be allowed, provided ordered disgorgement abides by the other restrictions laid out in *Liu*.

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336 *See Congress Seeks to Amend Securities Laws on Disgorgement*, *supra* note 332 ("The NDAA's securities law amendments are a partial response to *Kokesh* and *Liu*.").

337 *See* Press Release, Ben McAdams, Rep., U.S. House of Representatives, McAdams' Bipartisan Bills to Combat Money-Laundering, Human Trafficking and Investment Scams Included in Defense Policy Bill (Dec. 9, 2020), (available at https://www.legistorm.com/stormfeed/view_rss/1688599/member/3280/title/mcadams-bipartisan-bills-to-combat-money-laundering-human-trafficking-and-investment-scams-included-in-defense-policy-bill.html).

338 *See* 165 CONG. REC.184, H8930 (daily ed. Nov. 18, 2019) (statement of Rep. Al Green) (stating the bill would "ensure that the SEC has the tools it needs to hold bad actors accountable" and "the SEC does indeed have disgorgement authority").

339 *See* Mike Koehler, *The SEC Has Collected Approximately $4.6 Billion in Disgorgement in FCPA Actions*, FCPA PROFESSOR (Apr. 20, 2020, 12:06 AM), https://fcpaprofessor.com/sec-collected-approximately-4-6-billion-disgorgement-fcpa-enforcement-actions/ ("[S]ince [2004] the SEC has secured approximately $4.6 billion in disgorgement . . . .").

340 Liu v. SEC, 140 S. Ct. 1936, 1947 (2020) (quoting Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 211 n.1 (2002)).

341 *See* Gabaldon, *supra* note 102, at 1645 ("[W]hen a reenacted statute fails to change the prevailing administrative or judicial interpretation of some earlier version of that statute, the interpretation is legislatively endorsed.").

342 *See Liu*, 140 S. Ct. at 1947 (rejecting the prior construction principle because of the uncertain scope of the disgorgement remedy); *cf.* Angel Reyes & Benjamin Hunter, *Does the FTC Have Blood on Its Hands? An Analysis of FTC Overreach and Abuse of Power After* Liu, 68 BUFF. L. REV. 1481, 1484 (2020) (arguing that *Liu* "underscores that the Court will no longer allow federal agencies to expand their powers beyond those specifically granted by Congress").

343 *See supra* Part III.A.

344 *See supra* Part III.B.

2. *Section 78u(d)'s Statute of Limitations Guidelines Will Create Confusion for FCPA Enforcement*

In addition to addressing the Court's holding in *Liu*, Congress also took aim at the *Kokesh* decision in Section 6501. Recall that in *Kokesh*, the Court held that for the purposes of statute of limitations analysis, disgorgement under Section 78u(d) was a penalty and, therefore, must abide by a five-year statute of limitations restriction.[345] While it could be argued that disgorgement that abided by the *Liu* limitations was no longer a penalty, and therefore not restricted by the *Kokesh* imposed statute of limitations requirement,[346] Congress made the issue a moot point by expressly laying out a statute of limitations framework for securities provisions in Section 6501.

Section 6501 lays out specific statute of limitations ranges for efforts by the SEC to disgorge funds under the new provision, Section 78u(d)(7), by adding another new provision, Section 78u(d)(8). Section 78u(d)(8) establishes a baseline statute of limitations for disgorgement actions of five years.[347] Section 78u(d)(8) then increases the statute of limitations period to ten years for violations of three specific securities laws.[348] None of these specified securities laws pertains to the FCPA.[349] Additionally, the new provision increases the statute of limitations to ten years for violations of securities laws that include scienter as a requisite element to be proved.[350] Finally, the new provision of Section 78u(d) also provides that when the commission seeks a claim for an equitable remedy under Section 78u(d)(5), the statute of limitations period will also be ten years.[351]

The fact that FCPA violations are often well concealed means a long statute of limitations period is key to ensuring that those who commit acts of foreign

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[345] *See supra* Part II.B.

[346] *See* Andrew N. Vollmer, What Remains of *Kokesh* After *Liu*? 3 (June 26, 2020) (unpublished manuscript) (on file at https://ssrn.com/abstract=3636505) (arguing *Liu* overrode *Kokesh*).

[347] *See* National Defense Authorization Act, Pub. L. No. 116-283, § 6501(a)(3), 134 Stat. 3388, 3416 (2020) ("The Commission may bring a claim for disgorgement under paragraph (7) . . . (i) not later than 5 years after the latest date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim occurs . . . .").

[348] 15 U.S.C. § 78u(d)(8)(A)(ii)(I)-(III) (2018) ("[N]ot later than 10 years after the latest date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim . . . .").

[349] *Id.* § 78j(b); *id.* § 77q(a)(1); *id.* § 80b-6(1).

[350] *See id.* § 78u(d)(8)(A)(ii)(IV) ("[A]ny other provision of the securities laws for which scienter must be established.").

[351] *See id.* § 78u(d)(8)(B).

bribery are not able to evade disgorgement of their ill-gotten gains.[352] A ten-year statute of limitations period would be especially desirable for these actions. However, given that the FCPA is not one of the specified securities laws that triggers the longer limitations period, the SEC may only be able to seek this longer period for FCPA enforcement actions that require scienter to be established.[353] Here, the complexity of the FCPA will create some uncertainties that the lower courts will have to untangle because whether scienter is required depends on which provision of the FCPA is violated.

The Supreme Court has defined scienter both as "intent to deceive, manipulate, or defraud"[354] and as requiring a "degree of knowledge sufficient to 'make a person legally responsible for the consequences of his or her act or omission.'"[355] Whether the SEC must prove scienter in enforcing FCPA actions is complicated[356] and will create issues for courts as they determine whether to apply the baseline five-year statute of limitations period or the longer ten-year period. First, for an issuer or agent of an issuer to be civilly liable for violating the anti-bribery provision of the FCPA, which prohibits giving "anything of value" to "any foreign official" to secure business, it must be done "corruptly."[357] While the statute does not define "corruptly,"[358] at least three circuit courts have defined "corruptly" as requiring the sort of intent that the courts view as "scienter,"[359] and therefore this provision would trigger the ten-year statute of limitations period.[360] To be liable under the anti-bribery provisions for bribes to a third party rather than directly to a foreign official, the government must show that the briber acted "while knowing that all or a portion" of the bribe would go to a foreign official in order to obtain business.[361] Unlike

352 Velikonja, *supra* note 59, at 414. ("FCPA cases frequently include violations that are . . . entirely outside the limitations period . . . .").

353 15 U.S.C. § 78u(d)(8)(A)(ii)(IV).

354 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

355 Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) (citation omitted).

356 *See* David P. Burns & Erin K. Sullivan, *Navigating the FCPA's Complex Scienter Requirements*, BLOOMBERG FIN. L.P. (Apr. 1, 2009), https://www.gibsondunn.com/navigating-the-fcpas-complex-scienter-requirements/ ("The question of what level of knowledge and intent is necessary to violate the FCPA is a complicated one . . . .").

357 15 U.S.C. § 78dd-1(a)(1) (2018).

358 Legislative history does indicate that this term implied scienter. S. REP. NO. 95–114, at 10 (1977) ("The word 'corruptly' connotes an evil motive or purpose, an *intent* to wrongfully influence the recipient." (emphasis added)).

359 *See* United States v. Kay, 513 F.3d 461, 464 (5th Cir. 2008) (holding that jury instructions that stated an act is done "corruptly" if it is "done voluntarily and intentionally" were appropriate); Stichting Ter Behartiging v. Schreiber, 327 F.3d 173, 183 (2d Cir. 2003); United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991).

360 15 U.S.C. § 78u(d)(8)(A)(ii)(IV).

361 *Id.* § 78dd-1(a)(3).

"corruptly," the statute does define "knowing."[362] A person is "knowing" if they are aware that they are engaging in the conduct, that the circumstance exists,[363] or if they have a firm belief that the circumstance exists.[364] Further, to prevent a "head-in-the sand" type situation where a bribe-giver tries to remain willfully ignorant that his bribe will end up in the hands of a foreign official,[365] a person is also knowing if they "are aware of the high probability of the existence of such circumstance."[366] Because payments to third parties must be both "corrupt" and "knowing," the SEC would be required to prove scienter to disgorge funds from wrongdoers, which would trigger the ten-year statute of limitations.[367]

Second, whether scienter exists for violations of the accounting provisions is more complex. Issuers must abide by the "books and records" provision, which states that the issuer "shall make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[368] There is no knowledge or intent requirement for violations of this provision, so the provision creates strict liability for issuers.[369] Accordingly, the SEC would not need to establish scienter to disgorge funds from an issuer who violates this provision,[370] and therefore the statute of limitations for these actions would only be five years.

However, it gets more difficult to ascertain whether the SEC has five years or ten years to disgorge profits from persons, like Garth Peterson,[371] who are accused of violating the FCPA's internal control provisions. The provision reads that "[n]o person shall *knowingly* circumvent or *knowingly* fail to implement a system of internal accounting controls or *knowingly* falsify any book, record, or account described in paragraph (2)."[372] Because the SEC must establish knowledge—that is, scienter—it would have ten years to disgorge funds[373] from those such as Peterson who circumvented internal controls by misrepresenting

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362 *Id.* § 78dd-1(f)(2)(A).

363 *Id.* § 78dd-1(f)(2)(A)(i).

364 *Id.* § 78dd-1(f)(2)(A)(ii).

365 Burns & Sullivan, *supra* note 356.

366 15 U.S.C. § 78dd-1(f)(2)(B).

367 *But cf.* Burns & Sullivan, *supra* note 356 (arguing situations could exist in which a corporation would be required to pay fines for downstream violations of the FCPA by agents despite an absence of knowledge or intent by the corporation).

368 15 U.S.C. § 78m(b)(2)(A).

369 Burns & Sullivan, *supra* note 356.

370 Further, issuers are often held liable for the violations of subsidiaries. *See id.*

371 *See supra* Introduction.

372 15 U.S.C. § 78m(b)(5) (emphasis added).

373 *Id.* § 78u(d)(8)(A)(II).

or failing to disclose bribes.[374] Those who failed to implement accounting controls would, likewise, be subject to the ten-year statute of limitations. However, for those who *falsify* books or records in contravention of the FCPA, an SEC regulation has essentially done away with the scienter requirement.[375] Rather than intent, courts will look to the reasonableness of the person's behavior to analyze whether they should be held liable for the falsification of records.[376] For example, in the Peterson case, if a Morgan Stanley officer signed off on the misappropriated payments to Peterson, then whether the officer was liable for falsification of records would likely have been judged based on whether those actions were reasonable.[377] Here, because the statute says there is a scienter requirement but an SEC regulation says there is not, whether courts would impose a five-year or ten-year limitations period is an open question. This could lead to an arguably absurd outcome, where those who circumvent the accounting provisions are subject to a ten-year statute of limitations period while those who falsify these records or even fail to keep records at all are subject to a shorter, five-year period.

This raises a tangential but important third question: If the SEC is faced with a situation in which it is limited by the five-year statute of limitations, but is seeking to disgorge profits from a wrongdoer who has received ill-gotten gains outside of that limitation period, can it still use disgorgement as an equitable remedy under Section 78u(d)(5)? Under the new provision of Section 78u(d)(8)(B), "[t]he Commission may seek a claim for *any* equitable remedy, including for an injunction or for a bar, suspension, or cease and desist order, not later than ten years after the latest date on which a violation that gives rise to the claim occurs."[378] While the new provisions of Section 78u(d)(7) do provide express statutory authority for the SEC to seek disgorgement for securities violations,[379] this does not change the fact that the central holding of *Liu* was that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under

374 Complaint at 14, SEC v. Peterson, 2012 WL 1440462 (E.D.N.Y. Apr. 25, 2012) (No. 12CV02033).

375 Falsification of Accounting Records, 17 CFR 240.13b2–1 (2017) ("No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to section 13(b)(2)(A) of the Securities Exchange Act.").

376 *See* SEC v. Softpoint, Inc., 958 F. Supp. 846, 866 (S.D.N.Y. 1997) ("There is no scienter requirement; liability is predicated on 'standards of reasonableness.'").

377 *See id.*; *see also* SEC v. Hilger, No. 06-10012-JGD, 2008 U.S. Dist. LEXIS 123745, at *17 (D. Mass. June 11, 2008) (holding that to establish liability for falsifying books the SEC must prove the defendant "falsified or caused to be falsified" the books and that they "acted unreasonably in doing so").

378 15 U.S.C. § 78u(d)(8)(B) (emphasis added).

379 *Id.* § 78u(d)(7).

§ 78u(d)(5).”[380] Congress was aware of the *Liu* holding, and the decision to include the term “any” in Section 78u(d)(8)(B) could be read to allow a longer statute of limitations for disgorgement remedies that still abided by the *Liu* limitations. While courts will only grant equitable remedies when legal remedies are inadequate,[381] cutting off the statute of limitations for disgorgement actions based on confusion over whether the language of the provision or the language of an SEC regulation applies makes the legal remedy inadequate as applied to persons who falsify books and records in violation of the FCPA.[382]

B. Future Revisions to the FCPA Should Specify a Ten-Year Statute of Limitations for FCPA Actions and Route Disgorgement Money to Fund the SEC

Congress should return to these provisions and revise them in two substantive ways. First, Subsection One argues that Congress should add the FCPA to the list of securities laws that allow a ten-year statute of limitations period for disgorgement of ill-gotten gains. The erratic way in which statutes of limitations will apply to the FCPA—because of the uncertain presence of scienter as an element to be proved—will create headaches for courts, as well as companies who should have a reasonable idea of how long they might be liable for securities law violations. Second, Subsection Two argues that Congress should revisit and rewrite the way in which the SEC is funded. A firm statute of limitations for SEC enforcement actions is needed because, currently, SEC investigations take too long to complete.[383] A better funded SEC will be able to investigate violations more promptly and will also be better insulated from the future whims of Congress.

1. Congress Should Add the FCPA Anti-Bribery and Accounting Provisions to Section 78u(8)(A)(ii)

The first revision Congress should make to the disgorgement provision is to insert the FCPA anti-bribery and accounting provisions into Section 78u(8)(A)(ii) so that violations of these provisions clearly qualify for the ten-year statute of limitations period. The legislative history behind the recent statute

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[380] Liu v. SEC, 140 S. Ct. 1936, 1940 (2020).

[381] Beacon Theatres v. Westover, 359 U.S. 500, 509 (1959) (“[I]n the federal courts equity has always acted only when legal remedies were inadequate . . . .”).

[382] *See* Sanders v. Mt. Am. Fed. Credit Union, 689 F. 3d 1138, 1144 (10th Cir. 2012) (“Even when legal remedies are inadequate, courts must also weigh the case-specific equities in favor of both parties and the public interest before granting equitable relief.”).

[383] *See Gray Cloud*, *supra* note 109.

of limitations changes shows that Congress was deeply concerned about fraudsters keeping their ill-gotten gains simply because of a technicality.[384] The SEC and court systems would be much better served with a clear, uniform statute of limitations for all FCPA enforcement actions rather than being forced to waste limited resources litigating whether someone who falsified company records should escape with ill-gotten gains between five and ten years ago.[385] Uncertainty over what statute of limitations exists for those who falsify business records means wrongdoers who might otherwise have agreed to a settlement offer[386] would have a strong incentive to challenge the SEC's efforts to disgorge profits in court and could escape with ill-gotten gains.[387] Furthermore, because FCPA cases do not typically have identifiable defrauded investors who will sue for restitution,[388] they are precisely the type of cases where there are "fewer causes of actions and safeguards available" to protect the sanctity of the market and disincentivize violators.[389] Allowing bad actors to benefit from their fraud causes real harm to the capital markets system, which will not work if investors do not "have faith that bad actors can't profit off wrongdoing."[390] Because there is bipartisan support for increasing time limits for the SEC to use their disgorgement power to address these sorts of long-running frauds[391]—even

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384 *See* 165 CONG. REC. H8930 (daily ed. Nov. 18, 2019) (statement of Rep. Green) ("[*Kokesh*] was a boon to white-collar criminals . . . who are now able to defraud investors for a decade and keep their profits."); Velikonja, *supra* note 59, at 396 ("Congress must intervene because the status quo allows fraudsters who are caught to keep the money they stole under a legal technicality . . . .").

385 *See* 165 CONG. REC. H8930 (statement of Rep. McAdams) ("[T]he SEC is increasingly spending time and staff resources fighting new legal challenges from bad actors . . . .").

386 Indicative of the large sums at stake is the Petrobras *Lavo Jato* FCPA scandal, which resulted in the largest settlement in FCPA history. The settlement resulted from Petrobras admitting that certain executives signed false accounting certifications while paying bribes to Brazilian politicians. *See* Nicholas M. Berg, Maria González Calvet, David Peet & Eve L. Shabto, *Petrobras Reaches $1.78 Billion FCPA Resolution*, ROPES & GRAY (Oct. 1, 2018), https://www.ropesgray.com/-/media/Files/alerts/2018/10/20181001_AC_Alert.pdf.

387 *See Defense Bill to Expand SEC Powers and Authority*, *supra* note 328 (arguing companies should consider strict time limits in tolling agreements with the SEC in non-fraud claims).

388 *See* Transcript of Oral Argument, *supra* note 161, at 24.

389 *See* 165 CONG. REC. H8932 (daily ed. Nov. 18, 2019) (statement of SEC Chairman Jay Clayton) ("[A] period longer than five years from the date of the misconduct is appropriate in various circumstances.").

390 *See id.* (statement of Rep. McAdams); Velikonja, *supra* note 59, at 396 (arguing that allowing fraudsters to keep their money "undermines the credibility of the federal enforcement program").

391 The bill, which included the current increases to the SEC's statute of limitations, enjoyed strong bipartisan support. But increases to the statute of limitations were a small part of a massive, 1,480-page bill. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (2021). However, the earlier provision, which would have given the SEC a fourteen-year statute of limitations for disgorgement, passed the House with a 314 to 95 vote with bipartisan support. The parallel Senate bill that died in committee also had bipartisan sponsors. *See* Hazel Bradford, *House Passes Bill to Reverse Supreme Court Decision on SEC Disgorgement*, PENSIONS & INVS. (Nov. 19, 2019, 12:40 PM), https://www.pionline.com/legislation/house-passes-bill-reverse-supreme-court-decision-sec-disgorgement.

amongst those hesitant about increasing the statute of limitations periods[392]—Congress should expressly increase the statute of limitations period for FCPA enforcement to at least ten years at first opportunity.

2. *Congress Should Provide that Disgorgement Funds Go to Self-Funding the SEC*

Congressional and judicial concerns about raising the statute of limitations beyond ten years[393] reflect a well-founded concern: SEC investigations take longer than they should.[394] However, this is due more to a lack of effective funding[395] and excessive responsibilities[396] than to any kind of lethargy on behalf of the SEC. Moving forward, Congress should create new legislation that directs a portion of disgorged funds in FCPA actions to the SEC rather than to the Treasury. Presently, the SEC is reliant on funding from annual appropriations from Congress.[397] While these appropriations have increased in recent years,[398] they have not increased in a manner commensurate with the new responsibilities the SEC has as a regulatory agency.[399] The SEC, "first and foremost a disclosure agency,"[400] has seen its enforcement powers grow

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392 *See* 165 CONG. REC. H8930 (daily ed. Nov. 18, 2019) (statement of Rep. Wagner) (stating that, despite concerns about a longer statute of limitations, she supports a fourteen-year statute of limitations as a reasonable "first attempt").

393 *See id.*; *cf.* Kokesh v. SEC, 137 S. Ct. 1635, 1641 (2017) (noting that statutes of limitations are "vital to the welfare of society" (citation omitted)).

394 *See* Richard E. Brodsky, *Securities Exchange Act Section 4E(A): Toothless "Internal-Timing Directive" or Statute of Limitation?*, 11 WM. & MARY BUS. L. REV. 323, 326 (2020) ("SEC enforcement is and has long been dogged by excessive delay.").

395 *Cf. SEC Funding*, CFA INST., https://www.cfainstitute.org/en/advocacy/issues/sec-funding (last visited Feb. 2, 2022) ("[T]he lack of adequate resources available to the SEC contributed to its inability to more aggressively police the financial markets in recent years.").

396 *Cf.* Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Statement on Adoption of Resource Extraction Disclosure Rules (Dec. 16, 2020) (available at https://www.sec.gov/news/public-statement/clayton-resource-extraction-2020-12-16) (describing the SEC's responsibilities to implement "resource extraction rules" due to Dodd-Frank as "resource-consuming").

397 U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-268T, FEDERAL FEES, FINES, AND PENALTIES: OBSERVATIONS ON AGENCY SPENDING AUTHORITIES 8 (2016) ("[A]t the end of fiscal year 2014, the SEC had $6.6 billion unavailable balance in its Salaries and Expenses account because the fee collections exceeded appropriations.").

398 The SEC's budget increased in 2021 by $105 million. Melanie Waddell, *SEC, IRS Get Budget Boosts*, THINKADVISOR (July 16, 2020, 4:22 PM), https://www.thinkadvisor.com/2020/07/16/sec-irs-get-budget-boosts/.

399 *See* Brittany Fritsch, Comment, *Broken Windows Is a Broken Policy*, 47 U. TOL. L. REV. 767, 788–89 (2016) (arguing "the SEC is significantly underfunded and lacks the resources" to strictly regulate for compliance); *Memo to Congress: It's Time for SEC to Be Self-Funded*, INVESTMENTNEWS (May 25, 2011), https://www.investmentnews.com/memo-to-congress-its-time-for-sec-to-be-self-funded-36304.

400 Daniel M. Gallagher, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks at Society of Corporate Secretaries & Governance Professionals (July 11, 2013) (available at https://www.sec.gov/news/speech/spch071113dmghtm).

extensively every time the United States survives a financial crisis.[401] This is unlikely to change under the Biden administration, where it is likely the SEC will be even more active in pursuing enforcement actions.[402] By siphoning some of the exorbitant amounts secured from FCPA actions to the SEC itself,[403] the SEC would be better insulated from political wrangling over funding that led to the impasse of the NDAA prior to its passage.[404] Accordingly, those who violate the FCPA would be less likely to escape with their ill-gotten gains simply because the SEC is underfunded.[405]

Further, because the SEC was designed to be a nonpartisan organization,[406] freeing it from annual appropriations should allow the relatively scandal-free agency[407] to better enforce securities regulations without worry that political figures will threaten its budget for personal or political gain.[408] Allowing the SEC a portion of the money it disgorges from financial frauds would mirror current funding procedures that give the Environmental Protection Agency a portion of the money imposed as a penalty for superfund cleanups so that it can address future environmental messes.[409] An increased budget would better enable the SEC to proactively find and stop financial messes caused by those like Bernie Madoff or the operators of the next Enron, and is better than once again giving the agency powers as a reactive measure following another injury to our financial markets.[410]

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401 *See* Mike Koehler, *SEC Commissioners Acknowledge that Anti-Corruption Policy Is Outside the SEC's Area of Expertise*, FCPA PROFESSOR (Dec. 17, 2020), https://fcpaprofessor.com/sec-commissioners-acknowledge-anti-corruption-policy-outside-secs-area-expertise/.

402 *See* Dean Seal, *What Biden's Win Means for SEC Enforcement, Leadership*, LAW360 (Nov. 8, 2020, 5:17 PM), https://www.law360.com/articles/1323742/what-biden-s-win-means-for-sec-enforcement-leadership ("You are likely to see a more aggressive enforcement division under Biden, one that would be more willing to litigate aggressively . . . .").

403 In 2019, the SEC collected approximately $1.03 billion in FCPA enforcement actions. *See SEC FCPA Enforcement–2019 Year in Review*, FCPA PROFESSOR (Jan. 9, 2020), https://fcpaprofessor.com/sec-fcpa-enforcement-2019-year-review/.

404 *See* Roberta S. Karmel, *Threats to the SEC's Independence*, ABA (Dec. 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/12/09_karmel/.

405 *See* Sarah N. Lynch & Dave Clarke, *SEC Warns Budget Threats Give Swindlers Upper Hand*, REUTERS (Feb. 4, 2011, 12:34 PM), https://www.reuters.com/article/us-financial-regulation-sec-idUSN0419263820110204 (explaining that House Republicans who came to power sought deep budget cuts to undermine Dodd-Frank reforms they opposed).

406 *See* Karmel, *supra* note 404.

407 *See* Urska Velikonja, *Politics in Securities Enforcement*, 50 GA. L. REV. 17, 19 (2015).

408 *Memo to Congress*, *supra* note 399 (arguing self-funding would insulate the SEC "from the whims and follies of foolish politicians"). *But cf.* Karmel, *supra* note 404 (arguing that recent partisan concerns in the appointment of SEC commissioners have poisoned the agency).

409 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 397, at 10 (stating that, as of October 2010, the EPA held nearly $1.8 billion in funds to use for future cleanup efforts).

410 *Memo to Congress*, *supra* note 399.

Finally, there is sufficient political will to pass this type of legislation. Other financial regulatory agencies, such as the Federal Reserve and the Consumer Financial Protection Bureau, are already self-funded, thanks to congressional foresight.[411] The express grant of disgorgement powers to the SEC and lengthening of statute of limitations periods shows that Congress is in favor of empowering the agency to stop fraudulent acts that threaten the nation's financial health.[412] Further, given the current nationalist political climate,[413] allocating some of the disgorged FCPA money to the SEC is more likely to pass muster with Congress than competing solutions that suggest funneling the money to other nations or to an entity like the Organisation for Economic Co-operation and Development (OECD).[414] As a majority of the largest disgorgement awards come from foreign companies rather than American companies,[415] this solution should be more amenable to those who malign the FCPA as impeding the competitiveness of American businesses.[416]

CONCLUSION

The SEC's ability to disgorge profits from those who violate the Foreign Corrupt Practices Act (FCPA) is an invaluable tool that disincentivizes acts of bribery and incentivizes the maintenance of internal controls over issuers' books and records. Prevention of corruption encourages businesses, both American and foreign, to compete on an even playing field. Additionally, it has related benefits, such as encouraging rule of law and preventing human rights abuses.

The suggestion in *Liu* that disgorgement is not allowed if the SEC sends the funds to the Treasury has created a situation in which those who commit acts of bribery abroad can be financially rewarded for their wrongdoing. Congress's passage of new legislation that grants the SEC the express authority to disgorge

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411 Brooksley Born & William Donaldson, *Make Regulators Self-Funding*, POLITICO (Mar. 10, 2013, 9:03 PM), https://www.politico.com/story/2013/03/self-funding-of-regulators-would-help-fiscal-mess-088666.

412 *Cf.* Press Release, Marco Rubio, Sen., U.S. Senate, Rubio Urges Attorney General Barr to Vigilantly Enforce FCPA in Light of China Phase One Deal (Feb. 26, 2020) (available at https://www.rubio.senate.gov/public/index.cfm/2020/2/rubio-urges-attorney-general-barr-to-vigilantly-enforce-fcpa-in-light-of-china-phase-one-deal) (urging Attorney General Barr to enforce the FCPA against companies in China to safeguard American investors).

413 *See* Greg Ip, *Biden, Beware: The Nationalist Moment Hasn't Passed*, WALL ST. J. (Nov. 11, 2020, 12:18 PM), https://www.wsj.com/articles/biden-beware-the-nationalist-moment-hasnt-passed-11605112395.

414 *See* Matthew C. Turk, *A Political Economy Approach to Reforming the Foreign Corrupt Practices Act*, 33 NW. J. INT'L L. & BUS. 325, 329 (2013).

415 Eight of the ten largest FCPA settlements were for companies based outside the United States. *See* Michael S. Diamant, Christopher W. H. Sullivan & Jason H. Smith, *FCPA Enforcement Against U.S. and Non-U.S. Companies*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 353, 355 (2019).

416 *See id.*; Clayton, *supra* note 206.

profits and raise the statute of limitations to ten years is a laudable first step to addressing this problem, but it is not sufficient.

This Comment proposes that courts interpret Section 78u of the Exchange Act to allow money to be returned to the Treasury in FCPA actions, regardless of whether limitations from the *Liu* decision are extant. Further, this Comment argues that, given the uncertainty that the *Liu* decision created and that the new legislation will create, Congress should return to the drawing board and make several changes. First, Congress should expressly allow funds from FCPA disgorgement to go to the Treasury. Second, Congress should raise the statute of limitations for all FCPA actions to ten years. Third, Congress should redirect some of the disgorged money to the SEC specifically, rather than to the Treasury, so that the SEC can better handle its large portfolio of responsibilities. As a result, the SEC will be better positioned to protect investors, disincentivize corruption, and ensure an equitable playing field for all businesses abroad.

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