
D.C. Circuit Holds that Kokesch Does Not Preclude Imposition of Industry Bars

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In *Kokesch v. SEC*, 137 S. Ct. 1635 (2017) (“Kokesch”), the Supreme Court of the United States held that disgorgement is a penalty and, therefore, any attempt by the U.S. Securities and Exchange Commission (“SEC” or “Commission”) to seek disgorgement is subject to 28 U.S.C. §2462, which sets forth a five-year statute of limitations that applies to the enforcement of penalties. The SEC has traditionally relied on its broad power to seek disgorgement to enforce the securities laws. After *Kokesch*, there was discussion that the decision would curtail or possibly eliminate the SEC’s ability to use disgorgement and other equitable remedies, such as industry bars.

In *Saad v. SEC*, 2020 WL 6533465 (D.C. Cir. Nov. 6, 2020) (“*Saad v. SEC*”), the Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) held, in a matter of first impression for the circuits, that *Kokesch* does not restrict the SEC’s ability to impose industry bars. The petitioner argued that, under *Kokesch*’s reasoning, industry bars are punitive and would constitute an impermissible sanction under Section 19(e)(2) of the Securities Exchange Act of 1934 (the “Exchange Act”). The D.C. Circuit rejected that argument, holding that *Kokesch* is limited to an interpretation of §2462 and does not apply to other statutory provisions, including Section 19(e)(2) of the Exchange Act. With this decision, the D.C. Circuit joins several circuits that have refused to apply *Kokesch* beyond §2462.

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