CLIENT ALERT

First *Kokesh*, Now *Liu* - Supreme Court's Limits on Disgorgement May Impact FCPA Negotiations

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Monday's U.S. Supreme Court ruling in a securities action, *Liu, et al. v. Securities and Exchange Commission (SEC)*, will have implications in how disgorgement calculations are negotiated in Foreign Corrupt Practices Act (FCPA) matters. Courts may no longer enter disgorgement awards without considering legitimate business expenses.

Although decisions in the FCPA space are rare, this decision may have some positive outcomes with respect to potential disgorgement exposure for those embroiled in FCPA matters. Three years ago, the Supreme Court ruled in *Kokesh v. SEC* that because the SEC uses disgorgement "as a penalty," it is subject to the federal five-year statute of limitations. And, Monday, the Supreme Court further reduced disgorgement exposure by limiting the SEC's ability to use it without considering and deducting legitimate business expenses. To quote the ruling:

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

If you have any questions regarding this ruling or the FCPA, please feel free to contact Steve Grimes (sgrimes@winston.com or 312-558-8317).

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