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RESEARCH ARTICLE

THE REGULATION OF DISORGEMENT IN THE INDONESIA CAPITAL MARKET: REMAINING CONCERNS AND LESSONS FROM U.S.

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ABSTRACT

This study aimed to analyse the authority that recently empowered the Indonesia Financial Services Authority (OJK) based on OJK Regulation Number 65/POJK.04/2020 in conjunction with OJK Circular 17/SEOJK.04/2021. OJK was empowered to pursue

disgorgement in the Indonesian capital market as a new tool for protecting investors by analysing changes in disgorgement enforcement practices in the US. This study used a doctrinal legal method with a comparative approach. The comparative approach was used to examine the possibility of strengthening disgorgement enforcement applicable to current Indonesian law on such practices in the US. Disgorgement in Indonesia is similar to the previous one in the US. The disgorgement authority in the Capital Market Act was not explicit because OJK still interpreted "written orders" such as "grant ancillary relief to an injunction" when disgorgement was first introduced by the SEC. This poses challenges in calculating the number of disgorgements that may be limited or cancelled due to a lack of strong legal remedies when the violator does not pay the disgorgement. Considering practical experience in the US from Texas Gulfur Sulfur to Kokesh and Liu, disgorgement in Indonesia needs strengthening to maintain enforcement sustainability and avoid setbacks. Therefore, the strengthening should involve placing the disgorgement authority in the Capital Market Act, providing standard guidelines for the calculation of disgorgement amounts, and establishing regulations on procedures for civil lawsuits by OJK. This research provides insights into the reference for regulators and legislators to improve enforcement of the future disgorgement regime in Indonesia.

Keywords: *Disgorgement, Disgorgement Fund, Kokesh, Liu, Securities Regulation*

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INTRODUCTION

RECENTLY, the World Bank reported a strong correlation between economic growth and a country's capital market. This led to attention as a potential mechanism to assist MSMEs financing from the private to key strategic economic sectors.[1] However, violations in the capital market have triggered fear in recent years, forcing regulators to increase interventions.[2] This is similar to the recent scandal in Indonesia regarding the systemic Jiwasraya's case.[3] Jiwasraya conspired with stockbrokers to buy manipulated shares at the desired price and other methods by covering them in mutual funds.[4] It is the largest case in the history of the Indonesian capital market and causes a moral hazard to the market and investors. Consequently, regulators were demanded to compensate investors due to violations in the

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1 WORLD BANK, *Capital Markets Development: Causes, Effects, and Sequencing*, (2019), https://documents1.worldbank.org/curated/en/701021588343376548/pdf/Capital-Markets-Development-Causes-Effects-and-Sequencing.pdf.

2 *See* Kevin S. Haeberle & M. Todd Henderson, *A New Market-Based Approach to Securities Law*, 85 UNIV. CHICAGO LAW REV. 1313–1390 (2018), https://chicagounbound.uchicago.edu/uclrev/vol85/iss6/5/; Lena Rethel, *Capital market development in Southeast Asia: From speculative crisis to spectacles of financialization*, 5 ECON. ANTHROPOL. 185–197 (2018), https://onlinelibrary.wiley.com/doi/10.1002/sea2.12116.

3 *See* Lita Dharmayuni, *Paying a premium for an accounting crime*, 29 J. FINANC. CRIME 1396–1405 (2022), https://www.emerald.com/insight/content/doi/10.1108/JFC-09-2021-0215/full/html. The company's three executives, Hendrisman Rahim, Hary Prasetyo and Syahmirwan, had traded and invested the fund in multiple low-quality assets over the course of 10 years, allegedly with the help of asset management companies, businessmen and fund managers that had allegedly manipulated the fund for their own personal gain.

4 Ariella Gitta Sari, *Fraud Auditing Law Implications in the Case of Jiwasraya Insurance in Indonesia*, 7 INT. J. BUSINESS, ECON. MANAG. 203–210 (2020), https://archive.conscientiabeam.com/index.php/62/article/view/1244.

capital market by insurance companies, pension funds, securities, or investment managers.[5] Moreover, the previous enforcement measures failed because criminal and administrative sanctions did not treat investors. Instead, the funds went to the state or the Indonesia Financial Services Authority (*Otoritas Jasa Keuangan* or "OJK") treasury, which supervises the capital market in Indonesia.[6] Therefore, OJK is introducing disgorgement to investors to guarantee recovery and prevent violations in the capital market.

The new disgorgement in Indonesia was introduced in December 2020 and is effective from June 2021 through OJK Regulation (*Peraturan Otoritas Jasa Keuangan* or "POJK") No. 65/2020 concerning Disgorgement and Disgorgement Fund in the Capital Market ("POJK 65/2020") jo. OJK Circular Letter (*Surat Edaran Otoritas Jasa Keuangan* or "SE OJK") No. 17/SEOJK.04/2021 concerning Disgorgement and Disgorgement Fund in the Capital Market ("SE OJK 17/2021").[7] Therefore, this study aimed to discuss its comparison with the US, where disgorgement in the capital market has been running for more than half a century. It is interesting to conduct a theoretical and juridical comparison with the US. Although OJK has stated that disgorgement would involve compensation as a remedy and prevention, challenges remain unavoidable compared with the disgorgement development in the US. The previous enforcement of disgorgement in the US transitioned from an equitable remedy to a

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[5] Dwi Bhakti, Hidayat Sofyan Widjaja & Dihin Septyanto, *Buffetology's Use in Stock Trading Amid the COVID-19 Pandemic*, SSRN ELECTRON. J. 1–17 (2021), https://www.ssrn.com/abstract=3896854.

[6] Uni Tsulasi Putri, *Disgorgement as Remedial Action in Indonesian Capital Market Regime*, 11 J. HUK. NOV. 1–13 (2020), http://journal.uad.ac.id/index.php/Novelty/article/view/15673.

[7] Otoritas Jasa Keuangan, *OJK IMPROVE CAPITAL MARKET INVESTOR PROTECTION*, (2021), https://pasarmodal.ojk.go.id/Announcement/Detail/9aa7b779-3bbd-4837-a2e0-9488cb79b243.

penalty, resulting in the five-year statute of limitations period during Kokesh.[8]

Additionally, the disgorgement changed again when Liu became a punishment with more stringent restrictions.[9] Liu and the amendment of the Securities Exchange Act 1934 still leave some threshold questions regarding disgorgement to be answered in dispute in the next court. Therefore, a similar problem is inevitable in Indonesia, though it requires further analysis on the difference between remedial and punishment in US law with Indonesia.

The disgorgement practices in the US could also occur in Indonesia because the trigger for similar challenges such as the Kokesh and Liu cases is the OJK policy. This policy does not clarify the basis and procedures for determining disgorgement. On the contrary, the institution formulates an asset execution policy when the affected violator does not pay the disgorgement. OJK blocks actions, closes funds, securities, or other accounts, and performs book-entry of the assets of the infringing party by the Depository and Settlement Institution. Moreover, it conducts investigations into civil lawsuits and files a bankruptcy suit. Until its development, the policy authorizes OJK to confiscate assets such as land, buildings, and motorized vehicles when the violator fails to pay. These challenges are complex because Law Number 8 of 1995 concerning the Capital

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[8] Karol Marek Klimczak et al., *How to Deter Financial Misconduct if Crime Pays?*, 179 J. BUS. ETHICS 205–222 (2022), https://link.springer.com/10.1007/s10551-021-04817-0.

[9] Andrew N. Vollmer, *What Remains of Kokesh After Liu?*, SSRN ELECTRON. J. 1–5 (2020), https://www.ssrn.com/abstract=3636505. *See to* Theresa Gabaldon & Lyle T. Alverson, *Equity, Punishment, and the Company You Keep: Discerning a Disgorgement Remedy under the Federal Securities Laws*, 105 Cornell Law Rev. 1612–1679 (2020), https://www.cornelllawreview.org/2020/09/15/equity-punishment-and-the-company-you-keep-discerning-a-disgorgement-remedy-under-the-federal-securities-laws/.

Market ("Capital Market Act") does not explicitly give OJK authority to enforce disgorgement.

As in the US, the dispute in the Kokesh case in disgorgement enforcement began because the US Securities and Exchange Commission ("SEC") authority and the federal courts were not explicit in the Exchange Act.[10] The refusal could recur because there are no guidelines for the number of calculations in POJK 65/2020 in conjunction with SE OJK 17/2021. Therefore, something similar could happen, such as the SEC calculating greater disgorgement than it should.[11] This could happen as in 2017, where many rejections of disgorgement emerged with class action because of invalid calculation considered a punishment, not a remedy.[12] Its enforcement poses potential risks to OJK in its implementation, considering the repressive actions without the basis and clarity of the procedures for determining disgorgement.

The refusal of the violator to accept the disgorgement determination by the OJK resulted in a case before the State Administrative Court (*Pengadilan Tata Usaha Negara* or "PTUN"). The court authority demanded the cancellation of a written order from the OJK Board of Commissioners. OJK is afraid of the cancellation of the disgorgement by the Administrative Court to the Supreme Court's cassation. Also, it has exercised its authority to sue civilly to the District Court for the first time in history, requiring judges to decide and determine the amount of disgorgement. This does not end when the offending party exercises its right to appeal, as in the case of SEC

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[10] Karol Marek Klimczak et al., *How to Deter Financial Misconduct if Crime Pays?*, J. BUS. ETHICS 1–18 (2021), https://link.springer.com/10.1007/s10551-021-04817-0.

[11] Stephen M. Bainbridge, *Kokesh Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 WASHINGT. UNIV. J. LAW POLICY 18–30 (2018), https://openscholarship.wustl.edu/law_journal_law_policy/vol56/iss1/8/.

[12] Steven Peikin, *Remedies and Relief in SEC Enforcement Actions*, SEC (2018), https://www.sec.gov/news/speech/speech-peikin-100318.

v. Liu. In this case, the US Supreme Court was forced to issue a decision that narrowed the meaning of disgorgement. When this continues, there would be a surge in complaints against the disgorgement determination in the District Court. The regulation of disgorgement in Indonesia has weaknesses that need correction to avoid restrictive practices such as those in the US. The correction would also avoid the failure of previous compensation mechanisms that lacked a legal basis. Therefore, this study aimed to review OJK's authority over disgorgement enforcement by analyzing factors that change the practices in the US. The goal was to maintain the sustainability of disgorgement enforcement in Indonesia.

Part II of this paper discusses compensation schemes, including the disgorgement in the Indonesian capital market. In contrast, Part III describes disgorgement in the US as an enforcement tool used by the SEC and its ability to seek disgorgement after Kokesh and Liu. Part IV focuses on the strengthening of the enforcement of disgorgement in Indonesia. This section explores and suggests the factors for changing disgorgement enforcement practices in the US. The changes serve as guidelines for strengthening the disgorgement regime for regulators and legislators in the future. Part V presents the conclusion.

I. INVESTOR COMPENSATION SCHEME AGAINST VIOLATIONS IN THE CURRENT CAPITAL MARKET INDONESIA

IN INDONESIA, cases of capital market violations, such as the Antaboga Delta Sekuritas, reached investor losses of IDR 1.4 trillion in 2005, the case of Sarijaya Permana Sekuritas in 2008, where the main commissioner embezzled almost IDR 235 billion, caused a loss

to 8,700 investors, made OJK and the Self Regulatory Organizations, including the Indonesian Stock Exchange, Clearing Guarantee Institution, Depository, and Settlement Institution, seek other schemes that could protect investors.[13] In 2012, OJK established the Indonesia Securities Investor Protection Fund (Indonesia SIPF). The aim was to establish the Investor Protection Fund (DPP) based on the Decree of the Chairman of Bapepam-LK Number KEP-715/BL/2012, later strengthened in POJK Number 49/POJK.04/2016.[14] However, DPP is only funded by the investor transaction fees in the capital market, while investors keep increasing.[15] This is seen in the maximum compensation limit for capital market violations of only IDR 200 million for investors after an increase from IDR 100 million.[16] Furthermore, the lack of compensation is exacerbated by the criminal and administrative sanctions that do not benefit investors. Instead, criminal sanctions are included in the state treasury, while administrative sanctions are sent to the OJK treasury.[17] As a result,

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[13] TICMI, KEJAHATAN DI BIDANG PASAR MODAL (2016). *See also* Yozua Makes, *Challenges and Opportunities for the Indonesian Securities Takeover Regulations: A Comparative Legal Analysis*, 8 UNIV. PENNSYLVANIA EAST ASIA LAW REV. 83–125 (2013), https://scholarship.law.upenn.edu/ealr/vol8/iss2/1/; Xavier Nugraha, Krisna Murti, & Saraswati Putri, *'Third Parties' Legal Protection over Agreed Authorized Capital Amount by Founders in Limited Liability Companies*, 6 LENTERA HUKUM 173-188 (2019); Satrio Ageng Rihardi, and Indira Swasti Gama Bhakti, *Legal Responsibilities of Foreign Investors in Establishing Unicorn Start-Up Companies in Indonesia*, 4 JOURNAL OF PRIVATE AND COMMERCIAL LAW 114–136 (2020).

[14] *See* Indonesia Securities Investor Protection Fund, *INDONESIA SIPF HISTORY*, (2022), https://www.indonesiasipf.co.id/en/history.

[15] Rofikoh Rokhim, Wardatul Adawiyah & Ida Ayu Agung Faradynawati, *Financial Consumer Protection in Indonesia: Towards Fair Treatment for All*, *in* AN INTERNATIONAL COMPARISON OF FINANCIAL CONSUMER PROTECTION 201–224 (2018), http://link.springer.com/10.1007/978-981-10-8441-6_7.

[16] Indonesia Securities Investor Protection Fund, supra note 14.

[17] Rofikoh Rokhim, Nur Dhani Hendranastiti & Nevya Wulandary, *Investor Protection Fund and Trading Behavior: Evidence from Indonesia*, 15 INT. J. APPL. BUS.

investors do not get direct benefits from sanctions imposed on perpetrators of violations. The losses are not compensated back to investors, making the Indonesian capital market unfriendly. Consequently, a crisis of trust and integrity emerges, where investors seem reluctant to invest their capital in the capital market due to irreversible losses.

For this reason, the capital market and law enforcement must be integrated. Good corporate governance must be maintained when law enforcement is against alleged violations in a company or those involving the capital market.[18] Therefore, OJK began providing new enforcement and investor protection at the end of 2019. It discussed implementing the disgorgement practiced in the US as a remedial action, especially after the Jiwasraya case that had a loss of IDR 20 trillion to investors.[19] In 2020, the institution ratified the disgorgement in POJK 65/2020 in conjunction with SE OJK 17/2020, effective from July 2021.[20] The disgorgement is expected to prevent violators from enjoying illegal profits and return investors' losses as justice. Additionally, it would create an orderly, fair, and efficient Indonesian capital market and maintain its integrity due to a balance between investors and the parties.[21]

ECON. RES. 46–58 (2017), https://serialsjournals.com/abstract/37645_ch_4_f_-_rofikoh.pdf.

18 Nur Imamah et al., *Islamic law, corporate governance, growth opportunities and dividend policy in Indonesia stock market*, 55 PACIFIC-BASIN FINANC. J. 110–126 (2019), https://linkinghub.elsevier.com/retrieve/pii/S0927538X18305043. *See also* Hazem Daouk, Charles M.C. Lee & David Ng, *Capital market governance: How do security laws affect market performance?*, 12 J. CORP. FINANC. 560–593 (2006), https://linkinghub.elsevier.com/retrieve/pii/S0929119905000507.

19 *See also* Putri, *supra* note 6.

20 Otoritas Jasa Keuangan, *supra* note 7. The Disgorgement definition

21 Bert I. Huang, *The Equipoise Effect*, 116 COLLUMBIA LAW REV. 1595–1638 (2016), https://scholarship.law.columbia.edu/faculty_scholarship/97.

Disgorgement through POJK 65/2020 in conjunction with SE OJK 17/2021 is a written order by OJK to return profits or losses illegally avoided by the parties violating the Indonesian capital market's laws and regulations. A written order is to conduct or not conduct certain activities to comply with the laws and regulations in the financial services sector, or to prevent and reduce losses to investors, the public, and the financial services sector. Referring to Articles 2 and 3 of POJK 65/2020, the enacted disgorgement is not a punishment as in the US case. It is a written order to return illegal profits and administrative sanctions with ill-gotten gains to the fund account provider.[22] The order is intended to make the public unaware beforehand because it is only aimed at the violator first, not to disturb the market integrity. Furthermore, OJK could block and transfer assets to a fund account provider to prevent their diversion by violators. When the violator lacks assets in the account, the payment is made with fixed assets, such as land, motor vehicles, and buildings. Additionally, OJK anticipates violators bringing the case to the investigation stage, filing a civil lawsuit, or applying for bankruptcy if they cannot pay.

The OJK policy divides disgorgement into feasible and infeasible. The institution has the authority to calculate the funds' feasibility based on POJK 65/2020 and SE OJK 17/2021. A viable fund could be formed into a disgorgement fund, while infeasible funds are insufficient to create a disgorgement fund. When the funds raised from the imposition of disgorgement are declared feasible, an account is opened by the Fund Account Provider, which later becomes an Investor Loss Compensation Fund account. A balance of compensation funds management is transferred to the account

[22] Nikmah Mentari, *Pertanggungjawaban Individu Atas Ganti Disgorgement Yang Melibatkan Emiten*, 13 ARENA HUK. 501–527 (2020), https://arenahukum.ub.ac.id/index.php/arena/article/view/1091.

provided for developing the capital market industry. When the funds are declared infeasible by the OJK, they are transferred to a fund account for developing the capital market industry.

OJK gives written orders to violators of the capital market regulations based on the Capital Market Act and pursues profits obtained illegally or avoids losses against the law to return the illegal profits.[23] The written order in POJK 65/2020 refers to POJK Number 36/POJK.04/2018 concerning Procedures for Examination in the Capital Market Sector. The mechanism established for disgorgement enforcement through written orders involves OJK assessing and investigating indications of capital market violations. When there is a violation, the institution determines the disgorgement sent to the violator, appoints account providers to accommodate funds from violators, and determines the disgorgement payment by the violator. Furthermore, it identifies the disgorgement funds as feasible or infeasible, establishes a fund for distribution to investors, appoints an administrator, and prepares distribution plans. The distribution plan is approved and announced by OJK, followed by the claim process, payment and distribution of disgorgement fund claims, administrator's report, dismissal of the administrator, and dissolution of the disgorgement fund.

II. OVERVIEW DISGORGEMENT IN THE US

A. The Emergence and Mechanism of Disgorgement in the US

Violations in the capital market industry forced the US to draft new laws after the stock market decline and the 1929 economic crash,

[23] *See also* Putri, *supra* note 6.

known as the Great Depression.[24] After the crisis, Congress passed the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") to ensure ethical standards and order in the capital market.[25] In the Exchange Act, the SEC was formed to oversee the activities of the capital market and protect investors.[26] The Exchange Act mandates the SEC investigate and prosecute potential capital market violations against offenders.[27] In carrying out enforcement, the SEC on the capital market is executed by the SEC Enforcement Division by interpreting and enforcing the Exchange Act.[28] The SEC pursues federal court, administrative proceedings, or both simultaneously in case of violations.[29] Also, it could refer the violations to the Department of Justice for criminal law enforcement.[30]

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[24] George J. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 AM. ECON. REV. 132–155 (1973), https://www.jstor.org/stable/1803131.

[25] Michael Bordo & Harold James, *The Great Depression analogy*, 17 FINANC. HIST. REV. 127–140 (2010), https://www.cambridge.org/core/product/identifier/S0968565010000193/type/journal_article.

[26] SEC, *What We Do*, (2021), https://www.sec.gov/about/what-we-do.

[27] Heather White, *A Little Help from Our Friends: Moving Beyond Enforcement to Improve State and Local Government Compliance with Federal Securities Laws*, 22 N. Y. UNIV. J. LEGIS. PUBLIC POLICY 129–195 (2019), https://nyujlpp.org/wp-content/uploads/2019/12/White-A-Little-Help-from-Our-Friends-22-nyujlpp-129.pdf. The jurisdiction of the SEC covers a wide range of offenses such as insider trading, accounting fraud, market manipulation, misreporting by issuers of f inancial instruments, and corruption. *See also* SEC, *supra* note 26.

[28] David H. Solomon & Eugene Soltes, *Is "Not Guilty" the Same as "Innocent"? Evidence from SEC Financial Fraud Investigations*, 18 J. EMPIR. LEG. STUD. 287–327 (2021), https://onlinelibrary.wiley.com/doi/10.1111/jels.12282.

[29] Arthur F. Mathews, *Litigation and Settlement of SEC Administrative Enforcement Proceedings*, 29 CHATOLIC UNIV. LAW REV. 216–244 (1980), https://scholarship.law.edu/lawreview/vol29/iss2/3.

[30] *Id.* Pursuant to the Securities Exchange Act of 1934, the SEC was created and authorized to seek "injunctions barring future violations of the securities laws and refer cases to the Department of Justice for criminal prosecution."

In 1970, the SEC asked the US District Court for the Southern District of New York to authorize fair remedies through disgorgement with federal courts when dealing with insider trading cases in Texas Gulf Sulfur.[31] The request for disgorgement authority was made to protect investors better and serve the Exchange Act's preventive purposes.[32] This was accomplished because the Exchange Act did not allow the SEC to file disgorgement in federal court. In contrast, the Exchange Act through 15 USC § 78u(d)(5) allows the SEC to grant "ancillary relief" to an injunction.[33] This is intended as equitable ancillary relief from a federal court necessary in the interests of investors.[34] In the context of capital market enforcement, the SEC and federal courts may exercise additional powers of assistance.[35] These include redressing past offenses with a refund, future prevention

[31] SEC v. Tex. Gulf Sulphur Co.- 446 F.2d 1301, 1308 (2d Cir. 1971). Holding that "the SEC may seek [disgorgement] . . . so long as such relief is remedial relief and is not a penalty assessment." *See also* Lina M. Fairfax, *From Equality to Duty: On Altering the Reach, Impact, and Meaning of the Texas Gul Legacy*, 71 SMU LAW REV. 731–749 (2018), https://scholar.smu.edu/smulr/vol71/iss3/8.

[32] George W. Dent, *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 63 MINN. LAW REV. 865–961 (1983), https://scholarship.law.umn.edu/mlr/1373.

[33] *See* 15 U.S.C. § 78u(d)(5). In carrying out its law enforcement role, the SEC is statutorily empowered to pursue a wide range of remedies against securities law violators. These remedies include injunctions, administrative cease-and-desist orders, monetary penalties, and various forms of bars and suspensions.

[34] Caprice L. Roberts, *Statutory Interpretation and Agency Disgorgement Power*, 96 ST. JOHNS. LAW REV. 1–40 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4279007#.

[35] Cameron K. Hood, *Finding the Boundaries of Equitable Disgorgement*, 75 VANDERBILT LAW REV. 1307–1343 (2022), https://wp0.vanderbilt.edu/lawreview/2022/05/finding-the-boundaries-of-equitable-disgorgement/.

using special procedures, and ad interim appointment of special agents to perform management reimbursement.[36]

Considering this, the SEC stated that disgorgement was an equitable remedy because violators were forced to return funds illegally obtained by violating capital market laws.[37] The federal court finally agreed to assist the SEC in disgorgement under the 21(d)(5) Exchange Act (15 USC § 78u(d)(5)) as an equitable ancillary relief.[38] The courts further emphasized that the SEC may make remedies by disgorgement enforcement besides damages under the Exchange Act, provided it is not a penalty.[39] Therefore, enforcement of disgorgement must be a remedy as an additional fair favor exercised between the SEC and the federal courts and should not be a punishment.

The SEC has been mandated to impose civil penalties for insider trading cases under the Insider Trading Sanctions Act of 1984.[40] After four years, it was also authorized to impose civil penalties and disgorgement through the Securities Enforcement Remedies and the

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[36] Editors, *Comment, Equitable Remedies in SEC Enforcement Actions*, 123 PENN LAW REV. 1188–1216 (1975), https://scholarship.law.upenn.edu/penn_law_review/vol123/iss5/6.

[37] Fairfax, *supra* note 31. Disgorgement, correctly applied, differs from restitution in that disgorgement includes only illgotten gains, while restitution covers the entirety of losses. Disgorgement is often used interchangeably with "restitution" to mean the retrieval of fraudulent profits. Because restitution seeks to make investors whole, however, it differs importantly from disgorgement, which aims to deprive wrongdoers of fraudulent profits.

[38] John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 26 DUKE LAW J. 641–670 (1977), https://scholarship.law.duke.edu/dlj/vol26/iss3/1.

[39] *Id.*

[40] *See* Paul S. Atkins and Bradley J. Bondi, "Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program," *Fordham Journal of Corporate and Financial Law* 13 (2008): 367–417, https://ir.lawnet.fordham.edu/jcfl/vol13/iss3/1. *See also* Samuel N. Liebmann, *Dazed and Confused: Revamping the SEC's Unpredictable Calculation of Civil Penalties in the Technological Era*, 69 DUKE LAW J. 429–463 (2019), https://scholarship.law.duke.edu/dlj/vol69/iss2/4.

Penny Stock Reform Act 1990 (Remedies Act).[41] The Remedies Act provides broader powers regarding civil penalties for all violations.[42] It states that the SEC is authorized to seek unlawful gain through disgorgement with administrative proceedings.[43] Subsequently, enforcement of disgorgement was re-enforced in the Sarbanes-Oxley Act 2002 ("SOX Act"). This Act authorizes the SEC to enforce disgorgement and wherever federal courts could provide equitable ancillary relief to be resubmitted to investors under § 305(b).[44] The refund process is conducted through the Federal Account for Investor Restitution (Fair Fund) through a compensation mechanism to investors with a claim process.[45] This is because disgorgement is

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41 Min-woo Kang, *Inside insider trading regulation: a comparative analysis of the EU and US regimes*, CAP. MARK. LAW J. (2022), https://academic.oup.com/cmlj/advance-article/doi/10.1093/cmlj/kmac026/6833175. In 1990, the SEC was given another remedial tool by Congress: the ability "to seek monetary penalties against securities law violators." For all violations outside of insider trading, these penalties are administered in three tiers of severity and penalize a defendant by forcing them to either pay a set statutory amount per violation or a sum of money equal to the "gross amount of pecuniary gain."

42 Donna M. Nagy, *The Statutory Authority for Court-Ordered Disgorgement in SEC Enforcement Actions*, 71 SMU LAW REV. 903–926 (2018), https://scholar.smu.edu/smulr/vol71/iss3/18.

43 *Id.*

44 Brennen C. Walker, *In Liu of Disgorgement: A Call to Revise the SEC's Civil Remedy Toolkit to Effectively Deter Market-Harming Securities Law Violations*, 108 IOWA LAW REV. 469–503 (2022), https://ilr.law.uiowa.edu/print/volume-108-issue-1/in-liu-of-disgorgement-a-call-to-revise-the-secs-civil-remedy-toolkit-to-effectively-deter-market-harming-securities-law-violations/. With affirmative Congressional authorization to seek equitable remedies in place, the SEC no longer needed to appeal to district courts' inherent authority to apply equitable remedies and could as statutory authority for ordering disgorgement.

45 Elaine Buckberg and Frederick C. Dunbar, "Disgorgement: Punitive Demands and Remdial Offers," *Business Lawyer* 63, no. 2 (2008): 347–81, https://ssrn.com/abstract=1205762; Urska Velikonja, *Public Compensation for Private Harm: SEC's Fair Fund Distribution*, 67 STANFORD LAW REV. 331–395 (2015), https://www.stanfordlawreview.org/print/article/public-compensation-for-private-harm/.

related to recovery profits taken illegally by the violators from investors and creating capital market integrity.[46]

The disgorgement enforcement mechanism has several rules. First, it is only implemented based on violations under the federal securities law detrimental to investors and should not be conducted to seek profit.[47] Second, only federal courts have the authority to determine the final amount of disgorgement at the request of the SEC.[48] Third, the SEC calculates the amount of disgorgement based on a reasonable estimate of the profit on the violation.[49] Fourth, the SEC must provide an estimated calculation of the disgorgement amount when requesting the district court.[50] Fifth, violators are allowed to prove the unfairness of the SEC's estimate of the disgorgement amount.[51] Regarding the second step, the federal courts are mandated to decide the disgorgement at the request of the SEC. The federal court ordered the violators to pay the disgorgement money to an escrow account administrator appointed and tasked with identifying the investors harmed by the violators.[52] The money would be distributed to investors fairly and reasonably.[53] After the disgorgement amount

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46 Russel G. Ryan, *The Equity Facade of SEC Disgorgement*, 4 HARVARD BUS. LAW REV. ONLINE 1–14 (2013), https://www.hblr.org/2013/11/the-equity-facade-of-sec-disgorgement/.

47 White, *supra* note 27.

48 Jeanne L Schroeder, *Taking Misappropriation Seriously: State Common Law Disgorgement Actions for Insider Trading*, 11 AM. UNIV. BUS. LAW REV. 97–184 (2022), https://heinonline.org/HOL/LandingPage?handle=hein.journals/aubulrw11&div=7&id=&page=.

49 Hood, *supra* note 35.

50 *Id.*

51 Roberta S. Karmel, *Will Fifty Years of the SEC's Disgorgement Remedy Be Abolished?*, 71 SMU LAW REV. 799–810 (2018), https://scholar.smu.edu/smulr/vol71/iss3/12.

52 Prentiss Cox & Christopher Lewis Peterson, *Public Compensation for Public Enforcement*, 39 YALE J. REGUL. 61–135 (2022), https://www.yalejreg.com/print/public-compensation-for-public-enforcement/.

53 Karmel, *supra* note 51.

is received in the escrow account, the administrator makes Disgorgement Plans with the federal court's approval, and the injured investor registers and makes a claim.[54] When remaining the disgorgement money has not found a disadvantaged investor, it becomes infeasible for distribution to investors. Therefore, funds are channeled for development purposes in the capital market under the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 ("Dodd-Frank Act").[55] The explanation shows that the SEC only seeks and requests federal courts for disgorgement. Furthermore, a federal court has broader and stronger authority than the SEC because it approves disgorgement requests. It also determines the disgorgement money recovered and approves the recipient.[56]

B. SEC's Strength in Disgorgement Enforcement: After Kokesh to Liu

The SEC has several tools for capital market enforcement. Disgorgement became the preferred tool by seeing more than half a century enforced with larger funds raised.[57] However, the US Supreme Court has recently begun reshaping the enforcement with stricter limits on the SEC's authority to seek disgorgement, such as

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[54] Don Carillo, *Disgorgement Plans under the Fair Funds Provision of the Sarbanes-Oxley Act of 2002: Are Creditors and Investors Truly Being Protected?*, 6 DEPAUL BUSSINES COMMER. LAW J. 315–345 (2008).

[55] Elisha Kobre, *The SEC and Disgorgement After Liu*, BROMBERG LAW (2021), https://news.bloomberglaw.com/us-law-week/the-sec-and-disgorgement-after-liu.

[56] Patrick L. Butler, *Saving Disgorgement from Itself: SEC Enforcement After Kokesh v. SEC*, 68 DUKE LAW J. 333–370 (2018), https://scholarship.law.duke.edu/dlj/vol68/iss2/3.

[57] Jennifer J. Schulp, *Liu v. SEC: Limiting Disgorgement, but by How Much?*, 19 CATO SUPREME COURT REV. 2013–227 (2020).

when the SEC v. Charles R. Kokesh ("Kokesh") in 2015 and SEC v. Charles Liu and Xin Wang ("Liu").

Kokesh

In this case, the SEC filed a complaint with the US District Court for the District of New Mexico for Kokesh's misappropriation of funds from four business development companies from 1995 to 2009.[58] Furthermore, Kokesh was later accused of falsifying proxy statement reports and concealing the results of its misappropriation. The SEC considered Kokesh to have violated several provisions of the federal securities law and used disgorgement as enforcement.[59] In response, Kokesh stated that disgorgement must comply with the five-year statute of limitations in 28 USC § 2462 ("Statute of Limitations"). Therefore, what the SEC is asking for could only be the last five years and not the duration of the breach. The commission argued that disgorgement was not punishable under the Statute of Limitations as per Gabelli v. SEC 133 S. Ct. 1216, and no regulation provides a limitation period for disgorgement.[60] In this case, the US District Court for the District of New Mexico decided that the SEC could seek disgorgement. This is because the Statute of Limitations stipulates that what was limited was only civil penalties or forfeiture, pecuniary based on the US Supreme Court decision between Gabelli v. SEC.[61] Since the Statute of Limitations does not limit the federal courts, they hold Kokesh liable and must pay the disgorgement amount beyond the five years.[62] However, Kokesh appealed to the US Court of

[58] SEC v. Kokesh (2015), US Dist. LEXIS 179999.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*

Appeals against the federal court's ruling for the Tenth Circuit. In the tenth circuit, the verdict strengthens the previous federal decision by stating disgorgement is not a punishment and distinguishes it from forfeiture.[63]

The two verdicts made Kokesh lose undaunted, reversing the two previous rulings in his favor when he filed an appeal to the US Supreme Court. In its ruling, the US Supreme Court held that disgorgement has a punitive function rather than a remedy, meaning it is subject to the Statute of Limitations.[64] This ruling provides a change in the appearance of disgorgement from a fair remedy to a punishment.[65] The US Supreme Court disclosed reasons why disgorgement was a punishment. *First*, it was a punishment because the SEC first submitted it to the public and then to the violators, disrupting the market integrity. *Second*, it was a penalty for preventing the breach and not providing a remedy.[66] This was indicated by the SEC overstating the disgorgement amount of the breach for future prevention. *Third*, the disgorgement payments by the SEC with federal courts are mostly not distributed to

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[63] SEC v. Kokesh (2016), 834 F.3d 1158 (10th Cir.).

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

[65] Marc Litt et al., *Kokesh v. SEC : the end of a disgorgement era?*, 18 J. INVEST. COMPLIANCE 13–15 (2017), https://www.emerald.com/insight/content/doi/10.1108/JOIC-08-2017-0052/full/html; Brad Karp et al., *Beyond disgorgement: the impact of Kokesh on the SEC's pursuit of equitable remedies*, 19 J. INVEST. COMPLIANCE 13–16 (2018), https://www.emerald.com/insight/content/doi/10.1108/JOIC-04-2018-0031/full/html.

[66] Klimczak et al., *supra* note 8. The median penalty in 2020 was about $200 thousand, while the median disgorgement ordered was about $500 thousand. The highest penalty ever, ordered to JPMorgan in 2013, was $200 million, while disgorgements can exceed a billion dollars. The US Supreme Court ruled that disgorgements are punitive and therefore can only be applied within a five-year statute of limitations.

disadvantaged investors but the US Department of the Treasury.[67] Therefore, with disgorgement meeting the grounds as a penalty according to the US Supreme Court, the SEC's enforcement of disgorgement must be subject to the Statute of Limitations.[68] As a result, the SEC's enforcement of disgorgement cannot seek longer than five years.[69] This would narrow down the SEC because violators could use the ruling's argument.

Making disgorgement a permanent punishment does not provide a better solution because it threatens the disgorgement itself.[70] Disgorgement under penalty is similar to the previous arrangement not expressly permitted under the Exchange Act. However, it is increasingly uncertain because the SEC cannot seek additional fair assistance with federal courts when it is considered a penalty.[71] As a result, it cannot ask federal courts to enforce

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[67] Conor Daly, *Kokesh v. Sec: The Supreme Court Redefines an Effective Securities Enforcement Tool*, 77 MARYL. LAW REV. 51–72 (2018), https://www.marylandlawreview.org/volume-77-online-student/kokesh-v-sec-the-supreme-court-redefines-an-effective-securities-enforcement-tool.

[68] Michael Columbo & Allison Davis, *Age Before Equity? Federal Regulatory Agency Disgorgement Actions and the Statute of Limitations*, 7 HARVARD BUS. LAW REV. 32–48 (2017), https://www.hblr.org/2017/04/age-before-equity-federal-regulatory-agency-disgorgement-actions-and-the-statute-of-limitations/.

[69] Kokesh v. SEC (2017), 137 S.Ct. 1635. Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

[70] Daniel B. Listwa & Charles Seidell, *Penalties in Equity: Disgorgement after Kokesh v. SEC*, 35 YALE J. REGUL. 667–709 (2018), https://openyls.law.yale.edu/handle/20.500.13051/8272; Urska Velikonja, *Public Enforcement After Kokesh: Evidence from SEC Actions*, 108 GEORGETOWN LAW J. 389–443 (2019), https://www.law.georgetown.edu/georgetown-law-journal/in-print/volume-108/volume-108-issue-2-january-2020/public-enforcement-after-kokesh-evidence-from-sec-actions/.

[71] Velikonja, *supra* note 70.

disgorgement before the Exchange Act provides disgorgement as a punitive measure.[72] This is different because disgorgement has been considered a fair remedy, and federal courts are authorized to approve and instruct the SEC in the enforcement under the Exchange Act.[73] However, it does not state it is disgorgement but rather grant ancillary relief to an injunction for the benefit of investors.[74] The uncertainty surrounding this case has not been addressed by the US Supreme Court over the opinion known as "Footnote 3" regarding whether federal courts still have the authority to order disgorgement in SEC enforcement proceedings and comply with the Statute of Limitations.[75] Consequently, it is left behind for two years, resulting in uncertainty. Footnote 3 questions were finally answered in Liu discussed later.

Liu

In early 2016, the SEC brought Liu to the US District Court for the Central District of California for misappropriating investor funds to build and finance cancer treatment facilities in the B-5 immigrant investment program.[76] Liu was accused of diverting his funds overseas for marketing and taking investors' funds. He retaliated and argued that his actions aimed to expand the business and not take

[72] Bainbridge, *supra* note 11.

[73] Gabaldon and Alverson, *supra* note 9.

[74] Velikonja, *supra* note 70.

[75] Verity Winship, *Disgorgement in Insider Trading Cases: FY2005-FY2015*, 71 SMU LAW REV. 999–1013 (2018), https://scholar.smu.edu/smulr/vol71/iss3/23. In a footnote, the Court seemed to squarely challenge the SEC's ability to be awarded disgorgement at all, stating: "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."

[76] SEC v. Liu (2017), 262 F. Supp. 3d 957 (C.D. Cal.).

advantage of investors. However, the SEC rejected the argument that the disgorgement was executed with a reasonable estimate of the profits for Liu's misconduct. The funds to be returned are profits made by investors, while Liu's expenditures were not legitimate because they disguised his fraud. Therefore, a federal court ruled that Liu had violated section 17(a)(2) of the Securities Act, and he was ordered to pay a disgorgement.[77] After receiving the verdict, Liu appealed to the US Court of Appeals for the Ninth Circuit. Given Kokesh's incident, he defended that disgorgement was a penalty, and a federal court could not order it over SEC enforcement. Liu considered its tally by the federal court to be erroneous for not pre-deducting a legitimate business expense.[78] The ninth circuit ruled against Liu's complaint because the US Supreme Court refused to answer Footnote 3 in the Kokesh case. The US Supreme Court did not discuss the federal court's authority to order disgorgement in sentencing by the SEC, meaning it was indirectly allowed by the federal court.[79]

In May 2019, Liu filed a petition for a writ of certiorari to the US Supreme Court. He asked how the SEC could seek disgorgement and whether federal courts could provide equity ancillary relief, unlike section 21(d)(5) of the Exchange Act in the US. Therefore, the Supreme Court of Kokesh has declared that disgorgement is a punishment. After being accepted in November 2019 and heard in March 2020, Liu argued based on the US Supreme Court ruling in Kokesh. The SEC stated that disgorgement is a punishment. Moreover, he stated that section 21(d)(5) of the Exchange Act does not require federal courts to count and distribute disgorgement but provides for express powers

[77] *Id.*

[78] SEC v. Liu (2018), 754 F. App'x 505, 507 (9th Cir.).

[79] *Id.*

by the SEC as a remedy.[80] Liu used the argument that disgorgement did not extend to the federal courts' actions to provide fair remedies.[81]

The SEC rejected Liu's argument and argued that disgorgement had been a fair remedy, starting from Texas Gulfur Sulfur 50 years ago. Therefore, disgorgement has been expressly stated in section 21(d)(5) as to whether it is a punishment or not. The Exchange Act relates to the permitted federal court powers to provide equitable ancillary relief.[82] As a result, Liu's question has not been answered by the US Supreme Court on Kokesh. The question is intended to determine the extent of the authority of the SEC and the federal courts in disgorgement enforcement and how to calculate the amount of disgorgement.[83] In response, the US Supreme Court reviewed disgorgement and placed stricter limits, considering it an SEC tool as a fair remedy. This is because of the large amount of funds that could be obtained and not explicitly stated in the Exchange Act.

The arguments between Liu and the SEC showed that the US Supreme Court seemed reluctant to eliminate disgorgement. It focuses more on the limitations that must be placed on disgorgement to make it sustainable and remain a fair remedy.[84] Therefore, in Liu, the US Supreme Court explores the limitations of how disgorgement

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80 Liu v. SEC, 140 S. Ct. 1936, 1946 (2020). The Kokesh Court evaluated a version of the SEC's disgorgement remedy that seemed to exceed the bounds of traditional equitable principles. But that decision has no bearing on the SEC's ability to conform future requests for a defendant's profits to the limits outlined in common-law cases awarding a wrongdoer's net gains.

81 Liu v. SEC (2020), No. 18-1501, WL 3405845.

82 Aiste Zalepuga, Updating the Federal Agency Enforcement Playbook, 96 NOTRE DAME LAW REV. 2083–2106 (2021), https://scholarship.law.nd.edu/ndlr/vol96/iss5/12.

83 Cox and Peterson, *supra* note 52.

84 JEANNE L. SCHROEDER, *Taking Misappropriation Seriously: State Common Law Disgorgement Actions For Insider Trading*, CARDOZO LEGAL STUDIES RESEARCH PAPER NO. 625 (2021), https://ssrn.com/abstract=3784188.

is calculated and seeks disadvantaged investors to obtain Fair Funds. In June 2020, the court ruled that disgorgement as equity ancillary relief is permitted under section 21(d)(5) of the Exchange Act when the proceeds are exclusive of the legal expenses and are given to investors.[85] Although the decision in Liu allows the SEC to seek disgorgement as an important part of equity ancillary relief, there are limitations to enforcement. The enforcement of disgorgement must be consistent with justice with three conditions.[86] *First*, it may be an equitable remedy and must be returned to the aggrieved investor.[87] *Second*, it is only intended for the benefits obtained for the perpetrators of the violation and not for other parties. *Third*, it must first deduct legitimate business or operating expenses. Although Liu's ruling provides fairer limitations, it gives the SEC a narrower role in disgorgement enforcement. The SEC must calculate between net income and gross profit in determining legitimate expenses that reduce the disgorgement from the truth.[88]

This decision also poses a threat to the SEC in its implementation. Violators such as companies, groups, or individuals facing an investigation from the SEC could use this decision to promote lower or even eliminate disgorgement.[89] This could happen when an individual, group, or company demands that disgorgement be

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85 Liu v. SEC (2020), No. 18-1501, WL 3405845.

86 *Id.*

87 Walker, *supra* note 44.

88 Russ Ryan et al., *Unpacking the SEC's new disgorgement powers*, 22 J. INVEST. COMPLIANCE 180–188 (2021), https://www.emerald.com/insight/content/doi/10.1108/JOIC-02-2021-0008/full/html.

89 Kyle De Young & Wesley Wintermyer, *An Analysis of the Supreme Court's Decision in Liu v. SEC*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (2020), https://corpgrov.law.harvard.edu/2020/07/04/an-analysis-of-the-supreme-courts-decision-in-liu-v-sec/.

deducted from all legitimate business expenses.[90] It means that the violators only want to return the illegally obtained profits. This implies that reducing the disgorgement proceeds by legitimate business expenses reduces the proceeds to be returned to investors. Furthermore, the decision raises questions regarding the conditions meant by legal expenses in calculating the disgorgement to be reduced by illegitimate profits.[91] The US Supreme Court did not answer Liu and left the question open. When this is not resolved, it would have the same impact as the previous case, resulting in a future court dispute because of uncertainty. According to Daniel Walfish, a former senior counsel with the SEC's Enforcement Division in New York, uncertainty about Liu would reduce disgorgement enforcement or make it unobtainable in future cases.[92]

The SEC asked Congress to correct legislative remedies to mitigate Liu's impact of asserting its authority to pursue disgorgement with the federal courts.[93] In early 2021, Congress adopted section 6501 of the National Defense Authorization Act ("NDAA Act"), which amended the Exchange Act at section 21(d).[94] It authorized the SEC to disgorgement in federal courts and to limit ten years from the initial five years. Congress is only beginning to correct the contours of Liu's post-disgorgement. However, it raised many new questions likely to take years to resolve through courts and possibly additional legislation.[95] This indicates the disgorgement development in the US could be an important lesson for Indonesia,

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90 *Id.*

91 Schulp, *supra* note 57.

92 Daniel Walfish, *SEC May Lean on Civil Penalties Following Liu High Court Ruling*, BLOMBERG LAW (2020), https://news.bloomberglaw.com/securities-law/insight-sec-may-lean-on-civil-penalties-following-liu-high-court-ruling.

93 Ryan et al., *supra* note 88.

94 Walker, *supra* note 44.

95 *Id.*

currently implementing disgorgement enforcement. The lesson is important because the disgorgement condition in Indonesia is similar to the US.

III. STRENGTHENING THE REGULATION OF DISGORGEMENT IN THE INDONESIA CAPITAL MARKET

As an emergent concept from the jurisdiction of the common law system in Indonesia, the application of disgorgement adjusts the existing Capital Market Act. Although quite different, Indonesia should be ready to face the challenges in disgorgement enforcement, especially based on its establishment and implementation's theoretical and juridical foundations. This subsection identifies the three key points shaping the proposed disgorgement for stronger enforcement in the US. Furthermore, this proposed strengthening should be implemented by regulators and legislators. It could prevent market violations, establish applicable laws, and increase enforcement fairness.

A. The Laying the Basis of Disgorgement Authority in the Capital Market Act

Disgorgement is a progressive effort in Indonesia's law enforcement of capital market violations that have not been resolved to achieve investor justice. As a regulator, OJK is disintegrating and interpreting written orders without waiting for changes to the Capital Market Act to implement disgorgement.[96] Although these steps are well-

[96] Mentari, *supra* note 22.

intentioned, OJK should implement disgorgement to maintain sustainability. However, the first challenge is that the institution has not included disgorgement as an authority in the Capital Market Act, possibly considered unilateral because it has not been supported by the parliament. This is a unilateral assumption because OJK only interprets "written orders" to seek disgorgement. For instance, the SEC interprets any ancillary grant relief to an injunction intended as equitable ancillary relief to benefit investors. However, permitting disgorgement under the Capital Market Act would strengthen OJK enforcement. This is because it would be supported and approved when ratified after discussion with the parliament. The institution has authority over financial services, including the capital market based on the OJK Act. However, when not expressly permitted under the Capital Market Act, disgorgement in Indonesia would be considered only an initiative of the OJK. This is consistent with the opinion of Judge Roberts in Kokesh that disgorgement was an SEC draft not supported by Congress under the Exchange Act, making it very troubling.[97] Other judges followed the opinion with concerns about the lack of firm authority over disgorgement enforcement. The judges rethought exploring the boundaries of the scope of disgorgement.[98] Therefore, Congress supported disgorgement in early 2021 by revising section 21(d) of the Exchange Act.

The previous practice in the US is similar to the disgorgement authority in Indonesia, currently based on the POJK 65/2020. It is only in a written order and does not state that disgorgement could be entered. Therefore, disgorgement should be implemented through a written order in the Capital Market Act to strengthen its enforcement power. A strong theoretical framework would make disgorgement

[97] Jacqueline K. Chang, *Kokesh v. SEC: The Demise of Disgorgement*, 22 NORTH CAROLINA BANK. INST. 309–331 (2018).

[98] *Id.*

more accepted and welcomed by the community. Although incident practice in the US has been revised, it focuses only on federal court-based disgorgement and not on administrative processes.[99] Furthermore, the administrative process creates tension because of the recent Exchange Act amendments that do not cover the enforcement of disgorgement by the SEC.[100] After Kokesh and Liu, the SEC is using administrative processes in disgorgement enforcement because there are no restrictions under the Dodd-Farnck Act.[101] The SEC stated that the disgorgement in Liu's ruling was executed with a federal court and not an administrative process.[102] The Liu effect has resulted in reduced disgorgement enforcement. Therefore, the SEC shifts cases likely to be influenced by Liu to administrative proceedings.[103] The SEC carried out this strategy without applying Liu's limits, and the SEC enjoyed greater profits.

Indonesia needs a stronger legal basis in enforcing disgorgement to avoid incidents that could dim enforcement because OJK cannot enforce disgorgement. The disgorgement predicted to provide new protection to investors was expected to be stronger than before, but the opposite happened. Furthermore, Sakda Thanitcul and

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[99] Ro Reynolds, *Limits on SEC Agression: Liu v. SEC*, COLUMBIA BUSINESS LAW REVIEW (2021), https://journals.library.columbia.edu/index.php/CBLR/announcement/view/402 .

[100] Robert Cohen, Tatiana Martins & Fiona Moran, *SEC Acknowledges that Disgorgement Principles Apply to Administrative Proceedings*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (2021), https://corpgov.law.harvard.edu/2021/03/03/sec-acknowledges-that-disgorgement-principles-apply-to-administrative-proceedings/.

[101] Michael Dvorak, *SEC Administrative Proceedings and Equal Protection "Class of One" Challenges*, 3 COLUMBIA BUS. LAW REV. 1195–1129 (2015); Urska Velikonja, *Are the SEC's Administrative Law Judges Biased: An Empirical Investigation*, 92 WASHINGT. LAW REV. 316–369 (2017).

[102] Reynolds, *supra* note 99.

[103] Cohen, Martins, and Moran, *supra* note 100.

Srinopnikom stated that an enforcement mechanism must be implemented with broader regulations.[104] It should have laws to ensure enforcement works strictly through a legislative process. Therefore, placing disgorgement in the Capital Market Act strengthens enforcement in Indonesia by the OJK as a regulator and the parliament as a legislator. In placing the disgorgement, the proposal in the Capital Market Act uses a more assertive language to provide the main points. First, the authority of the OJK through a written order to impose disgorgement on the violators of laws and regulations in the capital market. Second, the obligation of the violating party to pay the disgorgement calculation to OJK through an account provided by an OJK appointee. Third, OJK to order the Depository and Settlement Institution or financial service institution to block Securities and other accounts and book-entry assets of parties subject to disgorgement. Fourth, OJK legal action when the violating party fails to pay the disgorgement. The Capital Market Act would authorize OJK and state that disgorgement is implemented to benefit investors.

B. Disgorgement Calculation Standard Guidelines

The SEC calculated the disgorgement amount only based on a reasonable estimate of illegal profits in the US. The judges in Kokesh stated that the model for calculating the disgorgement amount that mandated the SEC to seek and pursue disgorgement made it often

[104] Sakda Thanitcul & Tir Srinopnikom, *Monetary penalties: An empirical study on the enforcement of Thai insider trading sanctions*, 40 KASETSART J. SOC. SCI. 2452–3151 (2018), http://kasetsartjournal.ku.ac.th/abstractShow.aspx?param=YXJ0aWNsZUlEPTYzMTV8bWVkaWFJRD02NTgy.

misused.[105] The abuse was seen when the SEC exceeded the disgorgement amount in increasing the achievable enforcement. After the SEC established the count, the offending party had difficulty defending that the calculation was not a reasonable estimate due to the lack of accounting guidelines.[106] This is where the loopholes considered by the judges did not provide a fair remedy because they worsened the violators' condition. The conditions made judges define remedies for disgorgement to make concrete standards. This was aimed at clarifying guidelines and reducing the SEC's broad enforcement actions of determining the calculation.[107] The calculation was changed in Liu by first excluding the legal fees, forcing the SEC to calculate the net income and gross profit. Another challenge was the threat of losing the pursuit of disgorgement in some cases.[108]

The basis of the disgorgement calculation in the US provides guidelines for OJK and prevents violators from refusing to pay disgorgement, as in the case of Liu.[109] OJK conducts administrative sanctions based on POJK Number 3/POJK.O4/2021 concerning the Implementation of Activities in the Capital Market Sector (POJK 3/2021). POJK 3/2021 is important in implementing OJK because it helps calculate fines in administrative sanctions. However, the regulation concerning the calculation has not been followed by regulating the disgorgement when parties violate capital market laws. Article 94 letter A of POJK 3/2021 has reaffirmed that OJK could carry out disgorgement but does not show the disgorgement calculation. This implies a legal vacuum regarding the standard-setting guidelines

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[105] Chang, *supra* note 97.

[106] *Id.*

[107] *Id.*

[108] Walfish, *supra* note 92.

[109] David Ciepley, *Can Corporations Be Held to the Public Interest, or Even to the Law?*, 154 J. BUS. ETHICS 1003–1018 (2019), http://link.springer.com/10.1007/s10551-018-3894-2. Involve organizations where personal liability is not easily established.

for calculating the disgorgement. It needs a theoretical framework as a guideline for calculating before implementing disgorgement as a remedial measure to maintain the integrity of the capital market. Learning from Liu's case, disgorgement must be clear from the start to reduce ambiguity. In the US, remedial disgorgement is becoming increasingly limited because there are no clear, explicit rules regarding its calculation. Therefore, Congress fixed it on Liu to reduce business expenses first.

In Indonesia, POJK 65/2020 has not regulated the disgorgement amount, necessitating adding it to the SE OJK, which regulates the disgorgement on examination to achieve a fair calculation. OJK is advised to use the variable method in the calculation with examination processes for capital market violations detrimental to investors, including injuring good corporate governance. Scholar Vidhi Shah stated that each jurisdiction calculates the number according to the approach and development of the regulator on its authority.[110] There is no problem with calculating the varying amounts, provided the method is accepted and has an accurate estimation function in disgorgement enforcement against violators.[111]

Kevin S. Haeberle and M. Todd Henderson suggested regulating the capital market by providing access to transparency in accelerating enforcement disclosure.[112] According to Hutton et al, regulatory transparency increases the complementarity of public law enforcement that could improve law enforcement outcomes.[113] In

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[110] Vidhi Shah, *Determining Disgorgement in Securities Law*, 10 LAW REV. GOV. LAW COLL. 138–171 (2019), https://www.glcmumbai.com/lawreview/volume10/Vidhi%20Shah.pdf.

[111] *Id.*

[112] Haeberle and Henderson, *supra* note 2.

[113] Amy Hutton, Susan Shu, and XinZ Heng, *Regulatory Transparency and the Alignment of Private and Public Enforcement: Evidence from the Public Disclosure of SEC Comment Letters*, J. FINANC. ECON. 1–25 (2021).

Indonesia, transparent guidelines for calculating the disgorgement could help OJK enforce the disgorgement regime.[114] Moreover, it would strengthen the institution when a written order is filed with the PTUN by the violator. The calculation standard guidelines make the violators unable to run or dismiss and make the judge more confident in the OJK calculation. Furthermore, it provides legal certainty for the disgorgement and prevents the offending party from refusing to pay due to the absence of a calculation method. The method of calculating the disgorgement further allows the violator to defend when the calculation from the OJK is erroneous to make a fair final determination.[115] The assertion of accounting guidelines prevents the offending party from reducing other costs, as was the case in Liu.[116] Furthermore, the regulation of calculating the disgorgement provides clarity and guidance in the enforcement regime. It does not raise the question of how and on what basis the disgorgement is calculated and avoids inconsistencies in the calculation.[117] This is expected to avoid disgorgement practices with worse impacts, such as in the US, where Liu decided to limit disgorgement enforcement by first reducing business expenses.[118]

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[114] D. C. Langevoort, *Global Securities Regulation after the Financial Crisis*, 13 J. INT. ECON. LAW 799–815 (2010), https://academic.oup.com/jiel/article-lookup/doi/10.1093/jiel/jgq032.

[115] Ian Loader & Adam White, *How can we better align private security with the public interest? Towards a civilizing model of regulation*, 11 REGUL. GOV. 166–184 (2017), https://onlinelibrary.wiley.com/doi/10.1111/rego.12109.

[116] Robin Hui Huang, *Rethinking the Relationship Between Public Regulation and Private Litigation: Evidence from Securities Class Action in China*, 19 THEOR. INQ. LAW 333–361 (2018), https://www.degruyter.com/document/doi/10.1515/til-2018-0011/html.

[117] David Rosenfeld, *Civil Penalties Against Public Companies in SEC Enforcement Actions: An Empirical Analysis*, 22 UNIV. PENNSYLVANIA J. BUS. LAW 136–206 (2019).

[118] Reynolds, *supra* note 99.

The regulations for calculating the disgorgement provide a defined and consistent framework in creating concrete standards for applying OJK. They help explain how to arrive at the calculation of a certain amount of disgorgement. Moreover, the guidelines for the calculation would avoid the risk for OJK to give unfair and arbitrary discretion for disgorgement enforcement. The unavailability of the regulation would give OJK the flexibility to provide a higher disgorgement and change its disgorgement.[119] Too rigid guidelines for calculating disgorgement could lead to more expensive enforcement.[120] Conversely, a large discretion in calculation could cause arbitrary and inconsistent enforcement. Based on the cases in the US, OJK should develop guidelines for calculating the disgorgement. The enforcement and calculation of the disgorgement could be used to file a civil lawsuit in the district court when the violator fails to pay. Furthermore, OJK could show it in the calculation and avoid cancellation or reduction from the court by the judge in the district court. Therefore, the calculation method standard invented by Vidhi Shah could be a guide for OJK to determine how it would be adapted and conducted in Indonesia.

C. Establishment of Technical Regulations on Civil lawsuit Procedures

The disgorgement arrangement in Indonesia differs from that in the US, where violators do not pay according to the predetermined time limit. In the US, under the provisions of 17 CFR § 201.630, violators

[119] Brandon N. Cline & Claudia R. Williamson, *Trust and the regulation of corporate self-dealing*, 41 J. CORP. FINANC. 572–590 (2016), https://linkinghub.elsevier.com/retrieve/pii/S0929119916300967.

[120] Luigi Zingales, *The Future of Securities Regulation*, 47 J. ACCOUNT. RES. 391–425 (2009), https://onlinelibrary.wiley.com/doi/10.1111/j.1475-679X.2009.00331.x.

must make a statement of inability to pay for individuals and check financial statements for companies. This contrasts with Indonesia, where OJK has three legal remedies based on Article 9 paragraph (1) POJK 65/2020. The remedies are further processing to the investigation stage, filing a civil suit, and filing an application for a declaration of bankruptcy. In this study, only the authority of the first legal remedy could be used because the second option is difficult to implement. There are no technical regulations, though OJK has explicit authority based on the OJK Act. Although the third option is not optimal, it collides with the bankruptcy regime because OJK is still a concurrent creditor. The first option could be used, but it would encounter difficulties, such as in the US, which prefers the civil to criminal process due to the complexity of the evidence and the longer process.[121] Therefore, OJK should maximize the second legal remedy in assisting the disgorgement enforcement.

There are at least three problems with the current situation when using the second legal option of filing a civil lawsuit by OJK. First, the OJK Law was ratified in 2011 and had the authority to file a civil lawsuit under Article 30 of the OJK Act. However, the institution has never used this authority for consumer and investor protection in the financial services sector.[122] OJK lacks technical rules in the POJK regarding procedures for implementing civil lawsuits. Consequently, the first legal option is more used by bringing it to the investigation stage. This is because OJK prefers a joint investigation approach based on a multi-door system with government agencies such as the police and the prosecutor's office to reveal cases detrimental to the public in the financial services sector. One evidence is seen in the enforcement

[121] Cox and Peterson, *supra* note 52.

[122] Wetria Fauzi, *Pengaturan Pengajuan Gugatan Oleh Otoritas Jasa Keuangan Dalam Penyelesaian Sengketa Asuransi Di Indonesia*, 5 ADHAPER J. HUK. ACARA PERDATA 75–91 (2019).

of illegal fintech through the Investigation Alert Task Force. This is especially in the role of the Police and the Prosecutor's Office in assisting the OJK that has recently investigated illegal fin-tech enforcement in Indonesia with a criminal process.[123]

Second, the joint investigation approach on a multi-door system is interesting, but it does not regulate technical civil lawsuits with OJK.[124] This rule out the possibility for OJK to carry out asset confiscation executions.[125] The policy of a joint investigation approach based on a multi-door system is well implemented. However, the OJK's reliance on this system makes granting authority for civil lawsuits in POJK 65/2020 meaningless. Conversely, this opportunity should be used to maintain the capital market integrity to file a civil lawsuit when the violator does not pay the disgorgement and wants to confiscate assets.[126] The asset confiscation in civil law should be

[123] Ryan Randy Suryono, Indra Budi, and Betty Purwandari, *Detection of Fintech P2P Lending Issues in Indonesia*, 7 HELIYON 1–10 (2021).

[124] Niamh M. Brennan & Doris M. Merkl-Davies, *Do firms effectively communicate with financial stakeholders? A conceptual model of corporate communication in a capital market context*, 48 ACCOUNT. BUS. RES. 553–577 (2018), https://www.tandfonline.com/doi/full/10.1080/00014788.2018.1470143.

[125] Hans B. Christensen, Luzi Hail & Christian Leuz, *Capital-Market Effects of Securities Regulation: Prior Conditions, Implementation, and Enforcement*, 29 REV. FINANC. STUD. 2885–2924 (2016), https://academic.oup.com/rfs/article-lookup/doi/10.1093/rfs/hhw055.

[126] Stephen J. Choi & A. C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, 13 J. EMPIR. LEG. STUD. 27–49 (2016), https://onlinelibrary.wiley.com/doi/10.1111/jels.12096. According to Choi and Pritchard, who compare the effects of litigation by SEC with civil class actions, civil actions lead to greater stock-market effects and are more likely to force executives to stand down. Moreover, there are many cases for which class action is the only enforcement mechanism. The SEC selects which cases to pursue, while harmed investors typically face only one case which they can choose to pursue or not. For example, class actions are more likely than SEC litigation in cases of little public interest, in which few investors were harmed. The direct costs of litigation are limited. Many individual investors lack the requisite knowledge

conducted by court decision with or without collateral.[127] Therefore, OJK must have technical arrangements for civil suit procedures to assist the disgorgement enforcement. The procedure for civil lawsuits followed by the OJK should be regulated in the POJK for Consumer Protection through revisions. According to the financial services sector, it should encompass problems in the capital market and a whole following the OJK authority. Third, before implementing the disgorgement enforcement, OJK should strengthen the two things that place the disgorgement authority and the calculation guidelines. Therefore, this institution would be more prepared with strong concepts and regulations in the future.

CONCLUSION

THE EMERGENCE of disgorgement has attracted much attention from scholars and practitioners of Indonesian capital market law on the procedural aspects of this disgorgement policy, yet little has been written on the substantive aspects of its enforcement. This article aims to bridged this gap by comparative approach in strengthening disgorgement enforcement in Indonesia through the factors influencing the practice in the US by the SEC. The experience of incidental disgorgement enforcement practices in the US by the SEC has facilitated the proposal formulation in this study. First,

and resources to pursue civil action, leading them to opportunities for disgorgement.

[127] Wai Yee Wan, Christopher Chen & Say H. Goo, *Public and Private Enforcement of Corporate and Securities Laws: An Empirical Comparison of Hong Kong and Singapore*, 20 EUR. BUS. ORGAN. LAW REV. 319–361 (2019), http://link.springer.com/10.1007/s40804-019-00129-z. Additional costs may occur in the form of damages resulting from civil actions brought to court by harmed parties. Civil actions are an alternative, private enforcement mechanism that can be employed in litigating financial misconduct.

Indonesian law should recognize the disgorgement regime adopted by the OJK. It should ask for legislative improvements to lay the basis for the disgorgement authority in the Capital Market Act through the assistance of the Parliament. Second, standard guidelines for calculating the disgorgement should be added in the OJK Circular Letter to avoid practices limiting or canceling disgorgement. Third, technical regulations are needed for civil lawsuit procedures in the POJK for Consumer Protection when the violator fails to pay. The strengthening framework proposed does not mean that the current substantive aspects are ineffective. Conversely, strengthening the substantive aspects could achieve disgorgement enforcement that deters market abuses, builds clearer applicable laws, and increases access to justice in Indonesia. Therefore, further studies should focus on strengthening regulators and legislators in maintaining the sustainability of disgorgement enforcement.

REFERENCES

Amy Hutton, Susan Shu, and XinZ heng. "Regulatory Transparency and the Alignment of Private and Public Enforcement: Evidence from the Public Disclosure of SEC Comment Letters." *Journal of Financial Economics*, 2021, 1–25. https://doi.org/10.1016/j.jfineco.2021.07.011.

Atkins, Paul S., and Bradley J. Bondi. "Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program." *Fordham Journal of Corporate and Financial Law* 13 (2008): 367–417. https://ir.lawnet.fordham.edu/jcfl/vol13/iss3/1.

Bainbridge, Stephen M. "Kokesh Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases." *Washington University Journal of Law & Policy* 56 (2018): 18–30. https://openscholarship.wustl.edu/law_journal_law_policy/vol56/iss1/8/.

Benston, George J. "Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934." *The American Economic Review* 63, no. 1 (1973): 132–55. https://www.jstor.org/stable/1803131.

Bhakti, Dwi, Hidayat Sofyan Widjaja, and Dihin Septyanto. "Buffetology's Use in Stock Trading Amid the COVID-19 Pandemic." *SSRN Electronic Journal*, 2021, 1–17. https://doi.org/10.2139/ssrn.3896854.

Bordo, Michael, and Harold James. "The Great Depression Analogy." *Financial History Review* 17, no. 2 (October 14, 2010): 127–40. https://doi.org/10.1017/S0968565010000193.

Brennan, Niamh M., and Doris M. Merkl-Davies. "Do Firms Effectively Communicate with Financial Stakeholders? A Conceptual Model of Corporate Communication in a Capital Market Context." *Accounting and Business Research* 48, no. 5 (July 29, 2018): 553–77. https://doi.org/10.1080/00014788.2018.1470143.

Buckberg, Elaine, and Frederick C. Dunbar. "Disgorgement: Punitive Demands and Remdial Offers." *Business Lawyer* 63, no. 2 (2008): 347–81. https://ssrn.com/abstract=1205762.

Butler, Patrick L. "Saving Disgorgement from Itself: SEC Enforcement After Kokesh v. SEC." *Duke Law Journal* 68 (2018): 333–70. https://scholarship.law.duke.edu/dlj/vol68/iss2/3.

Carillo, Don. "Disgorgement Plans under the Fair Funds Provision of the Sarbanes-Oxley Act of 2002: Are Creditors and Investors Truly Being Protected?" *DePaul Bussines & Commercial Law Journal* 6, no. 2 (2008): 315–45.

Chang, Jacqueline K. "Kokesh v. SEC: The Demise of Disgorgement." *North Carolina Banking Institute* 22, no. 1 (2018): 309–31. https://scholarship.law.unc.edu/ncbi/vol22/iss1/17.

Choi, Stephen J., and A. C. Pritchard. "SEC Investigations and Securities Class Actions: An Empirical Comparison." *Journal of Empirical Legal Studies* 13, no. 1 (March 2016): 27–49. https://doi.org/10.1111/jels.12096.

Christensen, Hans B., Luzi Hail, and Christian Leuz. "Capital-Market Effects of Securities Regulation: Prior Conditions,

Implementation, and Enforcement." *Review of Financial Studies* 29, no. 11 (November 2016): 2885–2924. https://doi.org/10.1093/rfs/hhw055.

Ciepley, David. "Can Corporations Be Held to the Public Interest, or Even to the Law?" *Journal of Business Ethics* 154, no. 4 (February 5, 2019): 1003–18. https://doi.org/10.1007/s10551-018-3894-2.

Cline, Brandon N., and Claudia R. Williamson. "Trust and the Regulation of Corporate Self-Dealing." *Journal of Corporate Finance* 41 (December 2016): 572–90. https://doi.org/10.1016/j.jcorpfin.2016.07.016.

Cohen, Robert, Tatiana Martins, and Fiona Moran. "SEC Acknowledges That Disgorgement Principles Apply to Administrative Proceedings." Harvard Law School Forum on Corporate Governance, 2021. https://corpgov.law.harvard.edu/2021/03/03/sec-acknowledges-that-disgorgement-principles-apply-to-administrative-proceedings/.

Columbo, Michael, and Allison Davis. "Age Before Equity? Federal Regulatory Agency Disgorgement Actions and the Statute of Limitations." *Harvard Business Law Review* 7 (2017): 32–48. https://www.hblr.org/2017/04/age-before-equity-federal-regulatory-agency-disgorgement-actions-and-the-statute-of-limitations/.

Cox, Prentiss, and Christopher Lewis Peterson. "Public Compensation for Public Enforcement." *Yale Journal on Regulation* 39, no. 1 (2022): 61–135. https://www.yalejreg.com/print/public-compensation-for-public-enforcement/.

Daly, Conor. "Kokesh v. Sec: The Supreme Court Redefines an Effective Securities Enforcement Tool." *Maryland Law Review* 77 (2018): 51–72. https://www.marylandlawreview.org/volume-77-online-student/kokesh-v-sec-the-supreme-court-redefines-an-effective-securities-enforcement-tool.

Daouk, Hazem, Charles M.C. Lee, and David Ng. "Capital Market Governance: How Do Security Laws Affect Market

Performance?" *Journal of Corporate Finance* 12, no. 3 (June 2006): 560–93. https://doi.org/10.1016/j.jcorpfin.2005.03.003.

Dent, George W. "Ancillary Relief in Federal Securities Law: A Study in Federal Remedies." *Minnesota Law Review* 63 (1983): 865–961. https://scholarship.law.umn.edu/mlr/1373.

Dharmayuni, Lita. "Paying a Premium for an Accounting Crime." *Journal of Financial Crime* 29, no. 4 (September 30, 2022): 1396–1405. https://doi.org/10.1108/JFC-09-2021-0215.

Dvorak, Michael. "SEC Administrative Proceedings and Equal Protection 'Class of One' Challenges." *Columbia Business Law Review* 3 (2015): 1195–1129. https://doi.org/https://doi.org/10.7916/cblr.v2015i3.1767.

Editors. "Comment, Equitable Remedies in SEC Enforcement Actions." *Penn Law Review* 123, no. 5 (1975): 1188–1216. https://scholarship.law.upenn.edu/penn_law_review/vol123/iss5/6.

Ellsworth, John D. "Disgorgement in Securities Fraud Actions Brought by the SEC." *Duke Law Journal* 26, no. 3 (1977): 641–70. https://scholarship.law.duke.edu/dlj/vol26/iss3/1.

Fairfax, Lina M. "From Equality to Duty: On Altering the Reach, Impact, and Meaning of the Texas Gul Legacy." *SMU Law Review* 71 (2018): 731–49. https://scholar.smu.edu/smulr/vol71/iss3/8.

Fauzi, Wetria. "Pengaturan Pengajuan Gugatan Oleh Otoritas Jasa Keuangan Dalam Penyelesaian Sengketa Asuransi Di Indonesia." *ADHAPER: Jurnal Hukum Acara Perdata* 5, no. 1 (2019): 75–91. https://doi.org/10.36913/jhaper.v5i1.89.

Gabaldon, Theresa, and Lyle T. Alverson. "Equity, Punishment, and the Company You Keep: Discerning a Disgorgement Remedy under the Federal Securities Laws." *Cornell Law Review* 105, no. 6 (2020): 1612–1679. https://www.cornelllawreview.org/2020/09/15/equity-punishment-and-the-company-you-keep-discerning-a-disgorgement-remedy-under-the-federal-securities-laws/.

Gitta Sari, Ariella. "Fraud Auditing Law Implications in the Case of Jiwasraya Insurance in Indonesia." *International Journal of*

Business, Economics and Management 7, no. 4 (2020): 203–210. https://doi.org/10.18488/journal.62.2020.74.203.210.

Haeberle, Kevin S., and M. Todd Henderson. "A New Market-Based Approach to Securities Law." *University of Chicago Law Review* 85 (2018): 1313–1390. https://doi.org/http://dx.doi.org/10.2139/ssrn.3233122.

Hood, Cameron K. "Finding the Boundaries of Equitable Disgorgement." *Vanderbilt Law Review* 75 (2022): 1307–1343. https://wp0.vanderbilt.edu/lawreview/2022/05/finding-the-boundaries-of-equitable-disgorgement/.

Huang, Bert I. "The Equipoise Effect." *Collumbia Law Review* 116 (2016): 1595–1638. https://scholarship.law.columbia.edu/faculty_scholarship/97.

Huang, Robin Hui. "Rethinking the Relationship Between Public Regulation and Private Litigation: Evidence from Securities Class Action in China." *Theoretical Inquiries in Law* 19, no. 1 (February 13, 2018): 333–61. https://doi.org/10.1515/til-2018-0011.

Imamah, Nur, Tsui-Jung Lin, Suhadak, Siti Ragil Handayani, and Jung-Hua Hung. "Islamic Law, Corporate Governance, Growth Opportunities and Dividend Policy in Indonesia Stock Market." *Pacific-Basin Finance Journal* 55 (June 2019): 110–126. https://doi.org/10.1016/j.pacfin.2019.03.008.

Indonesia Securities Investor Protection Fund. "INDONESIA SIPF HISTORY," 2022. https://www.indonesiasipf.co.id/en/history.

Kang, Min-woo. "Inside Insider Trading Regulation: A Comparative Analysis of the EU and US Regimes." *Capital Markets Law Journal*, November 18, 2022. https://doi.org/10.1093/cmlj/kmac026.

Karmel, Roberta S. "Will Fifty Years of the SEC's Disgorgement Remedy Be Abolished?" *SMU Law Review* 71 (2018): 799–810. https://scholar.smu.edu/smulr/vol71/iss3/12.

Karp, Brad, Andrew Ehrlich, Lorin Reisner, Audra Soloway, Richard Tarlowe, Maia Lichtenstein, and Peter Vizcarrondo. "Beyond Disgorgement: The Impact of Kokesh on the SEC's Pursuit of Equitable Remedies." *Journal of Investment Compliance* 19, no. 3 (October 9, 2018): 13–16. https://doi.org/10.1108/JOIC-04-2018-

0031.

Klimczak, Karol Marek, Alejo José G. Sison, Maria Prats, and Maximilian B. Torres. "How to Deter Financial Misconduct If Crime Pays?" *Journal of Business Ethics*, May 6, 2021, 1–18. https://doi.org/10.1007/s10551-021-04817-0.

Klimczak, Karol Marek, Alejo José G. Sison, Maria Prats, and Maximilian B. Torres. "How to Deter Financial Misconduct If Crime Pays?" *Journal of Business Ethics* 179, no. 1 (August 6, 2022): 205–22. https://doi.org/10.1007/s10551-021-04817-0.

Kobre, Elisha. "The SEC and Disgorgement After Liu." Bromberg Law, 2021. https://news.bloomberglaw.com/us-law-week/the-sec-and-disgorgement-after-liu.

Langevoort, D. C. "Global Securities Regulation after the Financial Crisis." *Journal of International Economic Law* 13, no. 3 (September 1, 2010): 799–815. https://doi.org/10.1093/jiel/jgq032.

Liebmann, Samuel N. "Dazed and Confused: Revamping the SEC's Unpredictable Calculation of Civil Penalties in the Technological Era." *Duke Law Journal* 69 (2019): 429–63. https://scholarship.law.duke.edu/dlj/vol69/iss2/4.

Listwa, Daniel B., and Charles Seidell. "Penalties in Equity: Disgorgement after Kokesh v. SEC." *Yale Journal on Regulation* 35 (2018): 667–709. https://openyls.law.yale.edu/handle/20.500.13051/8272.

Litt, Marc, Jerome P. Tomas, Elizabeth L. Yingling, and Richard A. Kirby. "Kokesh v. SEC : The End of a Disgorgement Era?" *Journal of Investment Compliance* 18, no. 4 (November 6, 2017): 13–15. https://doi.org/10.1108/JOIC-08-2017-0052.

Loader, Ian, and Adam White. "How Can We Better Align Private Security with the Public Interest? Towards a Civilizing Model of Regulation." *Regulation & Governance* 11, no. 2 (June 2017): 166–84. https://doi.org/10.1111/rego.12109.

Makes, Yozua. "Challenges and Opportunities for the Indonesian Securities Takeover Regulations: A Comparative Legal Analysis." *University of Pennsylvania East Asia Law Review* 8, no. 2 (2013): 83–125.

https://scholarship.law.upenn.edu/ealr/vol8/iss2/1/.

Mathews, Arthur F. "Litigation and Settlement of SEC Administrative Enforcement Proceedings." *Chatolic University Law Review* 29, no. 2 (1980): 216–44. https://scholarship.law.edu/lawreview/vol29/iss2/3.

Mentari, Nikmah. "Pertanggungjawaban Individu Atas Ganti Disgorgement Yang Melibatkan Emiten." *Arena Hukum* 13, no. 3 (December 31, 2020): 501–27. https://doi.org/10.21776/ub.arenahukum.2020.01303.6.

Nagy, Donna M. "The Statutory Authority for Court-Ordered Disgorgement in SEC Enforcement Actions." *SMU Law Review* 71 (2018): 903–26. https://scholar.smu.edu/smulr/vol71/iss3/18.

Nugraha, Xavier, Krisna Murti, & Saraswati Putri. "Third Parties' Legal Protection over Agreed Authorized Capital Amount by Founders in Limited Liability Companies." *Lentera Hukum* 6, no. 2 (2019): 173-188. https://doi.org/10.19184/ejlh.v6i1.9676.

Otoritas Jasa Keuangan. "OJK IMPROVE CAPITAL MARKET INVESTOR PROTECTION," 2021. https://pasarmodal.ojk.go.id/Announcement/Detail/9aa7b779-3bbd-4837-a2e0-9488cb79b243.

Peikin, Steven. "Remedies and Relief in SEC Enforcement Actions." SEC, 2018. https://www.sec.gov/news/speech/speech-peikin-100318.

Putri, Uni Tsulasi. "Disgorgement as Remedial Action in Indonesian Capital Market Regime." *Jurnal Hukum Novelty* 11, no. 1 (February 28, 2020): 1–13. https://doi.org/10.26555/novelty.v11i1.a15673.

Rethel, Lena. "Capital Market Development in Southeast Asia: From Speculative Crisis to Spectacles of Financialization." *Economic Anthropology* 5, no. 2 (June 2018): 185–97. https://doi.org/10.1002/sea2.12116.

Reynolds, Ro. "Limits on SEC Agression: Liu v. SEC." Columbia Business Law Review, 2021. https://journals.library.columbia.edu/index.php/CBLR/announcement/view/402.

Rihardi, Satrio Ageng, and Indira Swasti Gama Bhakti. "Legal Responsibilities of Foreign Investors in Establishing Unicorn Start-Up Companies in Indonesia." *Journal of Private and Commercial Law* 4, no. 2 (2020): 114 - 136. https://doi.org/10.15294/jpcl.v4i2.27097.

Roberts, Caprice L. "Statutory Interpretation and Agency Disgorgement Power." *St. John's Law Review* 96, no. 1 (2022): 1–40. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4279007#.

Rokhim, Rofikoh, Wardatul Adawiyah, and Ida Ayu Agung Faradynawati. "Financial Consumer Protection in Indonesia: Towards Fair Treatment for All." In *An International Comparison of Financial Consumer Protection*, 201–24. Singapore: Springer Singapore, 2018. https://doi.org/10.1007/978-981-10-8441-6_7.

Rokhim, Rofikoh, Nur Dhani Hendranastiti, and Nevya Wulandary. "Investor Protection Fund and Trading Behavior: Evidence from Indonesia." *International Journal of Applied Business and Economic Research* 15, no. 5 (2017): 46–58. https://serialsjournals.com/abstract/37645_ch_4_f_-_rofikoh.pdf.

Rosenfeld, David. "Civil Penalties Against Public Companies in SEC Enforcement Actions: An Empirical Analysis." *University of Pennsylvania Journal of Business Law* 22 (2019): 136–206. https://doi.org/https://scholarship.law.upenn.edu/jbl/vol22/iss1/5.

Ryan, Russ, Matthew H. Baughman, Carmen J. Lawrence, Aaron W. Lipson, Richard H. Walker, Jessica Rapoport, Katie Barry, and Scott Hiers. "Unpacking the SEC's New Disgorgement Powers." *Journal of Investment Compliance* 22, no. 2 (July 17, 2021): 180–88. https://doi.org/10.1108/JOIC-02-2021-0008.

Ryan, Russel G. "The Equity Facade of SEC Disgorgement." *Harvard Business Law Review Online* 4 (2013): 1–14. https://www.hblr.org/2013/11/the-equity-facade-of-sec-disgorgement/.

Schroeder, Jeanne L. "Taking Misappropriation Seriously: State Common Law Disgorgement Actions For Insider Trading."

Cardozo Legal Studies Research Paper No. 625, 2021. https://ssrn.com/abstract=3784188.

Schroeder, Jeanne L. "Taking Misappropriation Seriously: State Common Law Disgorgement Actions for Insider Trading." *American University Business Law Review* 11, no. 1 (2022): 97–184.

Schulp, Jennifer J. "Liu v. SEC: Limiting Disgorgement, but by How Much?" *Cato Supreme Court Review* 19 (2020): 2013–2227.

SEC. "What We Do," 2021. https://www.sec.gov/about/what-we-do.

Shah, Vidhi. "Determining Disgorgement in Securities Law." *The Law Review, Government Law College* 10 (2019): 138–171. https://www.glcmumbai.com/lawreview/volume10/Vidhi%20Shah.pdf.

Solomon, David H., and Eugene Soltes. "Is 'Not Guilty' the Same as 'Innocent'? Evidence from SEC Financial Fraud Investigations." *Journal of Empirical Legal Studies* 18, no. 2 (June 7, 2021): 287–327. https://doi.org/10.1111/jels.12282.

Suryono, Ryan Randy, Indra Budi, and Betty Purwandari. "Detection of Fintech P2P Lending Issues in Indonesia." *Heliyon* 7 (2021): 1–10. https://doi.org/https://doi.org/10.1016/j.heliyon.2021.e06782.

Thanitcul, Sakda, and Tir Srinopnikom. "Monetary Penalties: An Empirical Study on the Enforcement of Thai Insider Trading Sanctions." *Kasetsart Journal of Social Sciences* 40, no. 3 (March 2018): 2452–3151. https://doi.org/10.1016/j.kjss.2018.01.013.

TICMI. *Kejahatan Di Bidang Pasar Modal*. Jakarta: TICMI, 2016.

Velikonja, Urska. "Are the SEC's Administrative Law Judges Biased: An Empirical Investigation." *Washington Law Review* 92 (2017): 316–369. https://doi.org/https://digitalcommons.law.uw.edu/wlr/vol92/iss1/8.

Velikonja, Urska. "Public Compensation for Private Harm: SEC's Fair Fund Distribution." *Stanford Law Review* 67 (2015): 331–395. https://www.stanfordlawreview.org/print/article/public-compensation-for-private-harm/.

Velikonja, Urska. "Public Enforcement After Kokesh: Evidence from SEC Actions." *Georgetown Law Journal* 108, no. 2 (2019): 389–443.

https://www.law.georgetown.edu/georgetown-law-journal/in-print/volume-108/volume-108-issue-2-january-2020/public-enforcement-after-kokesh-evidence-from-sec-actions/.

Vollmer, Andrew N. "What Remains of Kokesh After Liu?" *SSRN Electronic Journal*, 2020, 1–5. https://doi.org/10.2139/ssrn.3636505.

Walfish, Daniel. "SEC May Lean on Civil Penalties Following Liu High Court Ruling." Blomberg Law, 2020. https://news.bloomberglaw.com/securities-law/insight-sec-may-lean-on-civil-penalties-following-liu-high-court-ruling.

Walker, Brennen C. "In Liu of Disgorgement: A Call to Revise the SEC's Civil Remedy Toolkit to Effectively Deter Market-Harming Securities Law Violations." *Iowa Law Review* 108 (2022): 469–503. https://ilr.law.uiowa.edu/print/volume-108-issue-1/in-liu-of-disgorgement-a-call-to-revise-the-secs-civil-remedy-toolkit-to-effectively-deter-market-harming-securities-law-violations/.

Wan, Wai Yee, Christopher Chen, and Say H. Goo. "Public and Private Enforcement of Corporate and Securities Laws: An Empirical Comparison of Hong Kong and Singapore." *European Business Organization Law Review* 20, no. 2 (June 2019): 319–361. https://doi.org/10.1007/s40804-019-00129-z.

White, Heather. "A Little Help from Our Friends: Moving Beyond Enforcement to Improve State and Local Government Compliance with Federal Securities Laws." *New York University Journal of Legislation and Public Policy* 22, no. 1 (2019): 129–195. https://nyujlpp.org/wp-content/uploads/2019/12/White-A-Little-Help-from-Our-Friends-22-nyujlpp-129.pdf.

Winship, Verity. "Disgorgement in Insider Trading Cases: FY2005-FY2015." *SMU Law Review* 71 (2018): 999–1013. https://scholar.smu.edu/smulr/vol71/iss3/23.

World Bank. "Capital Markets Development: Causes, Effects, and Sequencing." Washington, 2019. https://documents1.worldbank.org/curated/en/701021588343376548/pdf/Capital-Markets-Development-Causes-Effects-and-Sequencing.pdf.

Young, Kyle De, and Wesley Wintermyer. "An Analysis of the Supreme Court's Decision in Liu v. SEC." Harvard Law School Forum on Corporate Governance, 2020. https://corpgrov.law.harvard.edu/2020/07/04/an-analysis-of-the-supreme-courts-decision-in-liu-v-sec/.

Zalepuga, Aiste. "Updating the Federal Agency Enforcement Playbook." *Notre Dame Law Review* 96, no. 5 (2021): 2083–2106. https://scholarship.law.nd.edu/ndlr/vol96/iss5/12.

Zingales, Luigi. "The Future of Securities Regulation." *Journal of Accounting Research* 47, no. 2 (May 2009): 391–425. https://doi.org/10.1111/j.1475-679X.2009.00331.x.