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The Impact Of Kokesh So Far, And What's Next: Part 2

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As we addressed in our first installment, until the U.S. Supreme Court issued its unanimous opinion in Kokesh v. SEC,[1] the U.S. Securities and Exchange Commission took the position that it could obtain disgorgement from defendants no matter how long ago the alleged wrongdoing occurred. Kokesh changed that, holding that SEC disgorgement is a penalty, not an equitable remedy, and therefore subject to the five-year statute of limitations codified in 28 U.S.C. § 2462. Courts and the SEC have been grappling with the ramifications of Kokesh ever since.

Our first article addressed if the SEC or other agencies can continue to obtain disgorgement at all. We considered the decision's immediate effects, the most obvious of which flows from the decision's most direct holding: The commission acknowledged that it can no longer seek disgorgement for conduct outside of a five-year statute of limitations and defendants have challenged previous disgorgement orders and holdings concerning conduct that occurred outside that time period.[2] Meanwhile, courts and others, including Congress and the IRS, have considered other consequences of Kokesh, including:
Are other SEC remedies also "penalties"?
Is disgorgement an "excessive fine" within the meaning of the Eighth Amendment?
Is disgorgement paid to a government agency deductible for U.S. federal tax purposes?

After a brief recap of the case, we review the state of play involving remedies and other effects of disgorgement as penalty in the wake of Kokesh. In short, many things have changed.

The Commission's Enforcement Action and the Supreme Court's Opinion in Kokesh

The relevant facts and case history in Kokesh were straightforward. The SEC filed its civil action against Charles Kokesh, the owner of two investment advisers that advised business development companies, in October 2009. The commission alleged that between 1995 and 2009, through his firms, Kokesh violated anti-fraud and other provisions of the federal securities laws by misappropriating $34.9 million from business development companies, and caused the filing of “false and misleading SEC reports and proxy statements.”

After a jury verdict in the commission’s favor, the court ordered Kokesh to pay a $2,354,593 civil monetary penalty, $34.9 million in disgorgement, and $18.1 million in prejudgment interest. The district court applied § 2462’s five-year limitations period to the civil monetary penalty, but agreed with the commission that the statute of limitations did not apply to disgorgement because it was not a “penalty.”

On appeal, Kokesh argued that the disgorgement amount should have been only $5 million because the five-year statute of limitations in § 2462 also applied to disgorgement. The U.S. Court of Appeals for the Tenth Circuit upheld the district court’s ruling. The Tenth Circuit’s opinion, which reflected the majority view among federal courts, created a split with the U.S. Court of Appeals for the Eleventh Circuit, which had held in SEC v. Graham that disgorgement was a “forfeiture” and thus subject to § 2462.[3]

The Supreme Court subsequently granted certiorari to resolve the circuit split, and unanimously and unambiguously reversed the Tenth Circuit’s decision. Although the court could have ruled narrowly that disgorgement as applied in the case constituted a penalty, it took a different approach by ruling much more broadly: “[w]e hold that SEC disgorgement constitutes a penalty.” The court also held that “[t]he 5-year statute of limitations in § 2462 therefore applies when the SEC seeks disgorgement.”[4]

The court determined that three principles demonstrated that SEC disgorgement was a penalty within the meaning of § 2462:
First, SEC disgorgement was imposed as a consequence for violations where the victim was the public at large, rather than an aggrieved individual.
Second, the primary purpose of SEC disgorgement was to deter future violations, which was inherently punitive.
Third, SEC disgorgement did not directly compensate victims, because a court had discretion over whether disgorged funds would be distributed to harmed investors or transferred to the U.S. Treasury.
As a result, the court held, “[w]hen an individual is made to pay a non-compensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty.”

The court dismissed the commission’s argument that disgorgement was “remedial.” Because SEC disgorgement sometimes exceeded profits, the court found that disgorgement in such cases “does not simply restore the status quo … [but] leaves the defendant worse off.”[5] For example, the opinion noted that SEC disgorgement may not consider defendants’ expenses that reduced illegal profits, and that courts have ordered insider trading tipper defendants to disgorge the profits of their tippees, even though the tippers never received any profits. Thus, according to the court, SEC disgorgement was not a remedy that simply returned defendants to their prior position, but rather a sanction that went beyond and penalized defendants for their conduct.

Are Other Remedies Actually “Penalties”?

In deciding Kokesh, the Supreme Court considered the purpose and effects of disgorgement in determining that it was a penalty, rather than an equitable remedy. The Supreme Court concluded that disgorgement was a penalty because it was imposed as a consequence of victimizing the public at large as opposed to individual victims, its primary purpose was to deter future violations, and the funds did not directly compensate victims and could exceed the defendant’s actual profits. Since the decision, lower courts have evaluated whether other equitable remedies were actually penalties under this framework, and therefore subject to § 2462.

Injunctions

Courts have reached different conclusions as to whether injunctions are punitive in the wake of Kokesh.

In the SEC v. Collyard matter discussed in part one, the Eighth Circuit reviewed whether an injunction entered by the district court was a penalty, and therefore time-barred after Kokesh. The Eighth Circuit noted that there was a "court of appeals split over whether an injunction can be a § 2462 'penalty.'"[6] The court determined that it "need not resolve whether an injunction *can be* a § 2462 'penalty,'" but found that the injunction ordered in the case was not a penalty under the Kokesh rubric because the injunction was imposed to protect the public, was based on the likelihood of future violations, and was not imposed to deter others from violations or to punish the violator.[7]

However, in SEC v. Gentile, the U.S. District Court for the District of New Jersey found that an "obey the law" injunction and penny stock bar requested by the SEC were punitive based on the rationale of Kokesh.[8] The court cited Kokesh's statement that "[w]hen an individual is made to pay a non-compensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty."[9] The court stated that the requested injunction did not have a retributive effect nor "restore any 'status quo ante,'" but instead merely would have required the defendant to obey the already established securities laws with the only additional effect being to stigmatize the defendant publicly.[10] The court additionally noted that the requested injunction was not remedial because there was no identified victim. Although the SEC argued that the requested injunction was remedial because it would serve to ensure that the defendant would not violate the securities laws again, the court found that the SEC had not adequately demonstrated that the defendant was likely to commit a future violation. Similarly, the court found that the penny stock bar requested by the SEC would not "restore any 'status quo ante'" and the only person who would be impacted by the order would be the defendant. Accordingly, because the SEC sought penal relief based on conduct that fell outside the statute of limitations, the court held that § 2462 applied and dismissed the action as time-barred.

In SEC v. Brooks, the representative of the deceased defendant's estate argued in a motion to dismiss the SEC's amended complaint that the SEC's disgorgement claim and claim for reimbursement of bonuses and stock sale profits under Section 304 of the Sarbanes-Oxley Act should be abated due to the defendant Brooks' death.[11] The defendant argued that after Kokesh, both claims were penal in nature, and because penal claims do not survive death, these claims must be dismissed. In denying the defendant's motion, the court found that the Supreme Court's decision in Kokesh did not mean that disgorgement was a penalty for survivability purposes; the SEC's disgorgement and reimbursement claims served both remedial and penal purposes; and in the Eleventh Circuit, "[a]s the SEC points out in the survival context, dual purpose sanctions are not penal and do not abate upon death."[12] The action is administratively closed pending the commission's consideration of a proposed settlement.[13]

Professional Bars

The SEC has broad authority to impose associational bars or suspensions with respect to at least seven different categories of securities industry participation.[14] In addition, the SEC possesses authority to bar individuals from participating in penny stock offerings and from serving as an officer or director of public companies.[15] Self-regulatory organizations, in particular the Financial Industry Regulatory Authority, also have authority to bar or suspend their members, subject to SEC oversight and appellate jurisdiction.[16] Finally, the SEC has authority to suspend or bar individuals from appearing and practicing before it. Defendants in SEC and FINRA actions and proceedings have raised challenges to industry bars in the wake of Kokesh on the grounds that they were "impermissibly punitive," and we expect to see more in the future.

In Saad v. SEC, the D.C. Circuit considered a former registered representative's petition for review of a commission order upholding a permanent bar imposed against him by FINRA for violating FINRA Rule 2010 by misappropriating his employer's funds and misleading investigators to conceal his wrongdoing.[17] The defendant asked the court to consider whether the lifetime FINRA bar was a penalty, and thus "impermissibly punitive." The court remanded the case for the commission to address the "relevance — if any — of the Supreme Court's recent decision in Kokesh v. SEC" and decide whether a permanent bar was a remedy or penalty. The court stated that it was required to do this because the "SEC may approve expulsion or suspension of a securities broker as a remedy, but not as a penalty."[18]

In a concurring opinion, Judge Brett Kavanaugh explained that he believed the court was correct to remand the case to the SEC. However, he definitively stated that barring a securities broker from the industry was a penalty and not a remedy after Kokesh. In his view, the bar was penal on the same grounds that Kokesh found disgorgement to be a punishment: it deterred future wrongdoing, expulsion and suspension were punitive, and it protected the investing public as opposed to providing victim compensation. Judge Kavanaugh stated, "our precedents characterizing expulsions or suspensions as remedial are no longer good law." He concluded, "FINRA and the SEC will have to reasonably explain in each individual case why an expulsion or suspension serves the purposes of punishment and is not excessive or oppressive." Further, he noted that whether FINRA and SEC sanctions were punitive or remedial mattered because "[i]f FINRA and the SEC must justify expulsions or suspensions as punitive (as I believe they must after Kokesh), they will have to explain why such penalties are appropriate under the facts of each case."[19]

In a separate opinion, Judge Patricia Millett expressed "grave doubts" about the panel's decision to remand for the SEC to address Kokesh.[20] Millett found that the SEC had explained its remedial reasons for imposing a permanent bar and that Kokesh did not help Saad because the Supreme Court held:
only that "[d]isgorgement" ordered by the Commission in "enforcement proceedings" prosecuted by the Commission itself to punish violations of "public law" "operates as a penalty under § 2462." In multiple respects, that bears no resemblance to FINRA's private decision in this case to disaffiliate from Saad because of his repeated violations of FINRA's own professional rules of conduct.[21]

Judge Millett noted that the Supreme Court has consistently ruled that "occupational debarment" is "nonpunitive."[22] Further, because statutorily "Congress has mandated that any securities-industry self-regulatory organization that wishes to register with the Commission include in its rules the ability" to discipline, suspend, expel members, those tools "cannot categorically be impermissibly 'excessive or oppressive' under Section 78s(e)(2)."[23]

In In the Matter of Talman Harris and Victor Alfaya, the commission sought a permanent collateral bar based on the respondent's guilty plea.[24] In assessing whether such a bar would be punitive after Kokesh, the administrative law judge noted that there was a split in the D.C. Circuit's precedents. The ALJ reasoned that, on the one hand, the D.C. Circuit had held that a SRO lifetime bar must be "remedial and not 'excessive or oppressive'"[25] and that an associational bar imposed by the commission could be a penalty under certain circumstances.[26] On the other hand, the ALJ noted (as did Judge Millett in Saad) that Kokesh did not disturb the "on-point" D.C. Circuit precedent.[27] The ALJ therefore concluded that, even if the bar was punitive, the commission could still impose it because the sanction was appropriate under a Steadman factor analysis.[28]

In terms of the impact of Kokesh on other professional bars, as previously noted, one court found that a penny stock bar was punitive in the circumstances in which it was sought to be imposed in that case.[29]

Similar challenges to officer and director bars are an almost certainty, as defendants argued even before Kokesh that such bars were penalties and accordingly subject to § 2462's five-year statute of limitations.[30] Before Kokesh, courts were split on whether officer and director bars were penal or remedial. In SEC v Quinlan, the district court granted summary judgment to the SEC based on the defendant's criminal convictions and imposed an injunction and a permanent officer and director bar, finding that the statute of limitations did not apply to claims for this relief. The defendant appealed, and the Sixth Circuit affirmed the district court's decision on the grounds that the district court's conclusions that "there was a risk of recurrence, that the risk to the investing public outweighed the severe collateral consequences of the equitable relief, and, therefore, that the permanent injunction and officer and director bar were remedial rather than punitive" were supported by the record and established that the equitable relief was not a penalty subject to § 2462.[31]

In contrast, in SEC v. Bartek, the Fifth Circuit held that an officer and director bar was a penalty. The district court had denied the SEC's request for a permanent injunction and officer and director bar against the defendants, finding that, as a matter of law, such relief is "construed as penalties because: (1) these remedies would have significant collateral consequences to the Defendants; (2) they do not address the past harm caused by the Defendants; and (3) the remedies do not focus on preventing future harm due to the low likelihood that the Defendants would engage in similar harmful behavior in the future."[32] The SEC appealed, and the Fifth Circuit affirmed the district court's decision, concluding that "[b]ased on the severity and permanent nature of the sought-after remedies, the district court did not err in denying the SEC's request on grounds that the remedies are punitive, and are thus subject to § 2462's time limitations."[33]

Restitution

The issue of whether restitution is still an equitable remedy in a U.S. Commodity Futures Trading Commission action after Kokesh was addressed in CFTC v. Southern Trust Metals Inc. et al.[34] In that case, the CFTC moved for contempt based on a defendant's failure to satisfy a judgment that ordered him to pay $2,103,617 in restitution and a $357,032 civil penalty. At the time of the motion, the defendant had only paid $500 toward restitution and nothing toward his penalty. In response, the defendant argued that restitution to the CFTC was no longer equitable relief after Kokesh, and therefore was not subject to enforcement by contempt. The magistrate judge found that the defendant's arguments "lack[ed] any merit" and the court affirmed and adopted the magistrate's findings.[35]

Can Disgorgement Be an "Excessive Fine"?

In SEC v. Metter, the defendant sought to have the Second Circuit overturn the district court's disgorgement order against him on the grounds that it violated the Eighth Amendment's excessive fines clause.[36] Following a bifurcated settlement in which the defendant consented to a judgment imposing permanent injunctions but reserved the right to litigate the amount of disgorgement and penalty to be imposed against him, the district court imposed joint and several disgorgement liability of $52,236,995. The Second Circuit agreed with the defendant's argument that "in light of the Supreme Court's recent decision in Kokesh ... the disgorgement liability imposed in this matter was essentially punitive in nature and thus was a fine within the meaning of the Excessive Fines Clause of the Eighth Amendment." The court determined, however, that the disgorgement amount imposed was not "grossly disproportional," and therefore not excessive for the related conduct.[37] In considering whether the disgorgement ordered was proportional, and while acknowledging the case was a civil enforcement action and not a criminal prosecution, the court examined the four "Bajakajian factors" and found that because "the disgorgement ordered almost precisely equaled the gains from the illicit conduct to the entity controlled by Metter, the resulting financial penalty was directly keyed to the scope of the wrongdoing."[38]

Is Disgorgement Paid to the Government Deductible for U.S. Federal Tax Purposes?

The implications of Kokesh could reach well beyond the securities context to tax law. In a June 2017 client alert, we anticipated that the Supreme Court's characterization of disgorgement as a penalty might lead the Internal Revenue Service to take the position that disgorgement payments were not deductible under Section 162(a) of the Internal Revenue Code, due to the operation of Section 162(f). Until recently, the wording of Section 162(f) was simply that no deduction should be allowed under Section 162(a) of "any fine or similar penalty paid to a government for the violation of any law." Under that version of Section 162(f), the IRS Office of Chief Counsel confirmed in a chief counsel memorandum that the IRS has taken the position after Kokesh that disgorgement payments in the securities enforcement context are barred from deduction by Section 162(f).[39]

As recently as 2016, the IRS had taken the position that disgorgement could sometimes be compensatory and sometimes be penal, meaning that a disgorgement payment could be deducted under Section 162(a), depending on the facts and circumstances under which the payment was made. The memorandum, at least in the securities enforcement context, provided a more definite answer. The memorandum first set out the general principle that, in order for a payment to a government to be deductible under Section 162(a), it must have been made as "a remedial measure to compensate another party,"[40] rather than as a punitive measure to punish past violations or deter future violations. Applying this principle to the issue of disgorgement payments, the memorandum stated that "[b]ecause, as the Supreme Court held [in Kokesh], disgorgement payments are penalties and are not compensatory, Section 162(f) prohibits a deduction under Section 162(a) for an amount paid as disgorgement for violating a federal securities law."[41] The IRS thus has taken the position that, in the securities enforcement context, disgorgement is penal and, therefore, amounts characterized as disgorgement are not deductible because of Section 162(f).

The position taken by the IRS in the memorandum is certain to be taken by the IRS currently and in the future in light of changes made to Section 162(f) in the recently enacted tax reform law. The law completely rewrote Section 162(f) and, inter alia, limited deductibility of amounts paid to a government to those amounts that are explicitly characterized as either restitution or an amount paid to bring the taxpayer into compliance with the law. Due to this change, any disgorgement amount incurred after the effective date of Dec. 22, 2017, would not be deductible under Section 162(a).

The law also adds a new provision, Code Section 6050X, which requires government entities that are complainants or investigators with regard to a violation of any law to report to the IRS any amount paid (greater than $600) pursuant to a settlement or court order. Such report must identify what, if any, portion of the amount paid represents restitution or costs of coming into compliance with the law.

Conclusion

Kokesh changed the paradigm for remedies in SEC enforcement actions. As analyzed in **part one**, courts and the SEC have reacted decisively and limited disgorgement in post-Kokesh cases to conduct within the five-year statute of limitations period. On the other hand, defendants have had little success when seeking to amend previously awarded disgorgement amounts. Yet, as we predicted, the potential ramifications of Kokesh go well beyond what initially meets the eye. As stated in SEC v. Jammin Java, there is now “uncertainty” in this “legal landscape.” Kokesh’s full impact is likely to be complex, far-reaching and the subject of litigation for some time to come, with consequences, as we are starting to see, that will not be limited to disgorgement or the SEC. Whenever potential “remedial” relief looms in connection with an enforcement action, the impact of Kokesh on that potential relief should be considered. There just may be “elephants in mouseholes.”

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

[2] This article supplements our initial analysis. See King & Spalding LLP, Client Alert, Reflections on Kokesh v. SEC: Potential Ramifications of SEC Disgorgement Being a Penalty (June 14, 2017) (“June 2017 Client Alert”), https://s3.amazonaws.com/kslaw-staging/attachments/000/004/567/original/ca061417.pdf?1498139481.

[3] SEC v. Graham, 823 F.3d 1357, 1363 (11th Cir. 2016).

[4] Kokesh, 137 S.Ct. at 1642, 1644.

[5] Id. at 1639.

[6] SEC v. Collyard, 861 F.3d 760, 764 (8th Cir. 2017); SEC v. Graham, 823 F.3d 1357, 1361 (11th Cir. 2016) (injunctions look forward in time, whereas penalties look backwards). However, other courts performed a fact-specific analysis to consider whether injunctions serve future purposes. See e.g. SEC v. Bartek, 484 F. App’x 949, 956–57 (5th Cir. 2012); SEC v. Quinlan, 373 F. App’x 581, 586–88 (6th Cir. 2010); U.S. v. Telluride Co., 146 F.3d 1241, 1245–48 (10th Cir. 1998).

[7] Collyard, 861 F.3d at 764 (emphasis added and internal quotation marks omitted). See also SEC v. Drake, 2017 WL 6507766, at *7 (C.D. CA. Dec. 18, 2017) (the SEC’s request for an injunction is not time-barred under the statute because the statute only applies to a civil fine, penalty or forfeiture, thus implying that an injunction is none of the above).

[8] SEC v. Gentile, No. 16-1619 (JLI), 2017 WL 6371301, at *3-4 (D.N.J. Dec. 13, 2017).

[9] Id. at 2.

[10] Id. at 4.

[11] SEC v. Brooks, No. 07-61526-CIV-ALTONAGA/Goodman, 2017 WL 3315137 (S.D. Fla. Aug. 3, 2017); U.S. v. Brooks, 872 F.3d 78 (2d Cir. 2017).

[12] Id. at 9.

[13] Order Administratively Closing Case, No. 0:07-cv-61526-CMA, ECF No. 133 (S.D. Fla. Dec. 8, 2017).

[14] Securities Exchange Act of 1934 ("Exchange Act"), Section 15(b)(6) - 15 U.S.C. § 78(u)) (The SEC can impose a collateral bar from associating in any capacity with a broker, dealer, investment adviser, municipal securities dealer, transfer agent, municipal adviser, or nationally recognized statistical rating organization.).

[15] Securities Enforcement Remedies and Penny Stock Reform Act of 1990 ("Remedies Act"). The Remedies Act added Section 21d(2) to the Exchange Act and Section 20(e) to the Securities Act of 1933.

[16] 15(A)(g)(2) of the Exchange Act. 15 U.S.C.A. § 78o (West).

[17] Saad v. SEC, 873 F.3d 297, 299 (D.C. Cir. 2017). FINRA Rule 2010 requires "[a] member, in the conduct of its business, [to] observe high standards of commercial honor and just and equitable principles of trade." Fin. Ind. Regulatory Auth., Manual, Rule 2010.

[18] Saad, 873 F.3d at 304.

[19] Id. at 304–06 (Kavanugh concurring).

[20] Id. at 307. Judge Millett wrote a "dubitante opinion" on Section II.B of the opinion.

[21] Id. at 308.

[22] Id. at 305.

[23] Id. at 309-310 (Judge Millett also articulated that unlike disgorgement, commission expulsion also protects the investing public. Additionally, Saad must, and has not, argued the "penalty" definition § 2462 should be extrapolated to his sanction.)

[24] In the Matter of Talman Harris & Victor Alfaya, Release No. 1213, 2017 WL 4942807 (Oct. 30, 2017).

[25] PAZ Sec. Inc. v. SEC, 566 F.3d 1172, 1176 (D.C. Cir. 2009) (quoting 15 U.S.C. § 78s(e)(2)).

[26] Compare Johnson v. SEC, 87 F.3d 484, 489–92 (D.C. Cir. 1996) (found a six-month bar on acting as a supervisor at a broker-dealer to be punitive), with McCurdy v. SEC, 396 F.3d 1258, 1264–65 (D.C. Cir. 2005) (held that the commission "may impose sanctions for a remedial purpose, but not for punishment," and that the purpose of a one-year suspension from practicing before the commission as an accountant "was not to punish McCurdy, but rather to protect the public").

[27] The "on-point circuit precedent" cited is Kornman v. SEC, 592 F.3d 173, 187–89 (D.C. Cir. 2010) (affirmed imposition of a permanent bar after considering the Steadman factors); Horning v. SEC, 570

F.3d 337, 346 (D.C. Cir. 2009) (similar).

[28] Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); see also In the Matter of Gary M. Kornman, Release No. 59403, 2009 SEC LEXIS 367, at *22 (Feb. 13, 2009), pet. denied, 592 F.3d 173 (D.C. Cir. 2010).

[29] SEC v. Gentile, 2017 WL 6371301 (D.N.J. Dec. 13, 2017).

[30] Before explicit statutory authority was granted, the SEC imposed officer and director bars based on the equitable powers of the court. However, almost all bars the SEC obtained were imposed in the context of settlements as opposed to litigation. Prior to specific statutory authority being granted, only one court imposed an officer and director bar in a litigation context. The SEC gained statutory authority to impose officer and director bars under the Remedies Act. See Section 20(b) of the Securities Act and Section 21(d)(1) of the Exchange Act.

[31] SEC v. Quinlan, 373 F. App’x 581, 588 (6th Cir. 2010).

[32] SEC v. Bartek, 484 F. App’x 949, 956-57 (5th Cir. 2012).

[33] Id.

[34] CFTC v. Southern Trust Metals Inc., et al., No. 14-22739-CIV-KING, 2017 WL 3835692 (S.D. Fla. Sept. 1, 2017).

[35] Id. at *2. See also U.S. v. Brooks, 872 F.3d 78, 91 (2d Cir. 2017) (the court reasoned that “[t]he Supreme Court concluded that a pecuniary sanction such as disgorgement constitutes a penalty under § 2462 only if its purpose is punishment and deterrence, ‘as opposed to compensating a victim for his loss.’ Id. at 1642. Our holding here is not to the contrary. We agree that restitution's goal is victim compensation, not punishment.”)

[36] SEC v. Metter, 706 F. App'x 699 (2d Cir. 2017).

[37] Id. at 703.

[38] Id. at 704; U.S. v. Bajakajian, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (The four factors are: (1) the essence of the crime of the defendant and its relation to other criminal activity, (2) whether the defendant fits into the class of persons for whom the statute was principally designed, (3) the maximum sentence and fine that could have been imposed, and (4) the nature of the harm caused by the defendant's conduct.); See also SEC v. First Jersey Secs. Inc., 101 F.3d 1450, 1474–75 (2d Cir. 1996).

[39] IRS C.C.A. 201748008 (Dec. 1, 2017).

[40] Id.

[41] Id.