



Decision

Matter of: U.S. Securities and Exchange Commission—Postjudgment Interest and the Miscellaneous Receipts Statute

File: B-322531

Date: March 30, 2012

DIGEST

Postjudgment interest collected by the U.S. Securities and Exchange Commission (SEC) under 28 U.S.C. § 1961 on money judgments entered by federal district courts when persons found to have violated federal securities laws have failed to pay monetary sanctions ordered by SEC constitutes money for the government. Accordingly, the miscellaneous receipts statute, 31 U.S.C. § 3302(b), requires that, unless otherwise provided by law, such money must be deposited into the general fund of the Treasury. SEC did not identify and we are not aware of any statute that specifically exempts postjudgment interest from the application of the miscellaneous receipts statute.

DECISION

The Chief Financial Officer of the U.S. Securities and Exchange Commission (SEC) requests a decision regarding the application of the miscellaneous receipts statute, 31 U.S.C. § 3302(b), to postjudgment interest collected under 28 U.S.C. § 1961 on money judgments entered by federal district courts when persons found to have violated federal securities laws have failed to pay monetary sanctions ordered by SEC. Letter from Chief Financial Officer, SEC to General Counsel, GAO (Aug. 22, 2011) (Request Letter). At times, SEC deposits postjudgment interest in accounts known as “distribution funds” for eventual disbursements to investors who were harmed by actions of the person ordered by SEC to pay the monetary sanctions. As we explain below, postjudgment interest is a penalty imposed by law for failure to pay monetary sanctions ordered by SEC. It, therefore, constitutes “money for the Government” and must be deposited into the general fund of the Treasury pursuant to the miscellaneous receipts statute.

Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and to elicit the agency's legal position on the subject

matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. In this case, SEC provided its legal views at the time of its request.

BACKGROUND

SEC is the agency responsible for the civil enforcement of federal securities laws.¹ In pursuing that charge, SEC is authorized to enforce the federal securities laws in both administrative proceedings and in civil actions filed in federal district court. Request Letter, at 2–3.

In an administrative proceeding, SEC may order persons who violate the federal securities laws to pay monetary sanctions. *Id.* at 2. The most common forms of monetary sanctions, according to SEC, are disgorgement (the payment of the wrongdoer’s ill-gotten gains or losses avoided) and civil money penalties.² *Id.* SEC has the statutory discretion to distribute disgorgement collections and civil money penalties to harmed investors. To accomplish this, the Penny Stock Reform Act of 1990 (also known as the Remedies Act)³ and the Sarbanes-Oxley Act⁴ authorize SEC to create special funds, referred to as “distribution funds,” to hold disgorgement and civil money penalties pending distribution to investors. *Id.*

In the event a respondent fails to comply with an SEC administrative order imposing monetary sanctions, SEC may seek a money judgment in federal district court. *Id.* at 3. SEC explains that under 28 U.S.C. § 1961, postjudgment interest accrues on any unpaid portion of such money judgment from the date of entry of the money judgment until the judgment is paid in full to SEC. *Id.* At issue here is the proper disposition of this postjudgment interest. The Remedies Act permits SEC to impose

¹ See SEC, *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Security, and Facilitates Capital Formation*, available at www.sec.gov/about/whatwedo.shtml (last visited Feb. 29, 2012).

² See, e.g., 15 U.S.C. §§ 77h-1(e), 78u-2(e), 78u-3(e), 80a-9(e), 80a-9(f)(5), 80b-3(j), 80b-3(k)(5) (disgorgement of ill-gotten gains or losses avoided). See also, e.g., 15 U.S.C. §§ 78u-2, 80a-9(d) and 80b-3(i) (civil money penalties in administrative proceeding).

³ Pub. L. No. 101-429, §§ 102(e), 202(e), 203(e), 301(f)(5) and 401(j), 104 Stat. 931, 933–47 (Oct. 15, 1990) (codified, as amended, at 15 U.S.C. §§ 77h-1(e), 78u-2(e), 78u-3(e), 80a-9(f)(5) and 80b-3(j)).

⁴ Pub. L. No. 107-204, § 308, 116 Stat. 745, 784–85 (July 30, 2002) (codified, as amended, at 15 U.S.C. § 7246) (Sarbanes-Oxley Act).

interest on disgorgements it has ordered administratively (referred to as “prejudgment interest”). The act, however, does not address postjudgment interest that accrues on a judgment entered by a federal district court.

DISCUSSION

The miscellaneous receipts statute, 31 U.S.C. § 3302(b), requires that “an official or agent of the Government receiving *money for the Government* from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b) (emphasis added). The primary purpose of the miscellaneous receipts statute is to ensure that Congress retains control of the public purse, and to protect Congress' constitutional power to appropriate monies. See, e.g., 67 Comp.Gen. 353, 355 (1988); 51 Comp.Gen. 506, 507 (1972). We are aware of no statute, nor has SEC identified any to us, that specifically exempts postjudgment interest from this requirement. Rather, SEC argues that postjudgment interest does not constitute “money for the Government” and that the miscellaneous receipts statute, therefore, does not apply. We disagree.

Postjudgment interest accrues, by operation of law, when SEC obtains a federal district court money judgment because a person has not paid to SEC an SEC-ordered monetary sanction (disgorgement and/or civil money penalty, as well as any prejudgment interest SEC had ordered to be paid). Thus, postjudgment interest results when SEC acts to vindicate the interests of the United States in collecting the delinquent sanctions. In that regard, it constitutes “money for the Government,” as that phrase is used in the miscellaneous receipts statute.

Indeed, amounts that SEC collects in disgorgement and as civil money penalties (and interest thereon) also constitute money for the government that SEC, but for the statutory discretion invested in SEC by provisions of the Remedies Act and the Sarbanes-Oxley Act, would have to deposit into the general fund of the Treasury under the miscellaneous receipts statute. *Accord*, 17 C.F.R. § 201.1102(b) (SEC is not required to distribute disgorged funds and civil penalties collected in its administrative actions to harmed individuals, and may choose instead to remit the funds directly to the U.S. Treasury.). When SEC orders disgorgement or imposes civil money penalties, it is acting in its regulatory capacity on behalf of the United States. See *SEC v. Brennan*, 230 F.3d 65, 72 (2nd Cir. 2000). The primary purpose of disgorgement is to deter violations of securities laws by depriving violators of their ill-gotten gains. *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997). While a civil penalty also serves as a deterrent, its primary purpose is to punish individual violators for their wrongdoing. *Off. Comm. of Unsecured Creditors of WorldCom v. SEC*, 467 F.3d 73, 81 (2nd Cir. 2006).

When SEC exercises its statutory discretion to make these amounts available to investors, SEC, acting within that statutory authority, may divert the amounts collected into the distribution funds that it creates rather than depositing the amounts in the general fund of the Treasury. The fact that SEC has this discretion, however,

does not alter the fundamental nature of the collections. “Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly secondary goal.” *Fischbach Corp.*, 133 F.3d at 175. In fact, the Commission has the power to require disgorgement regardless of whether particular investors suffered any damages. See, e.g., *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). We note that even when SEC has exercised this discretion, amounts remaining after SEC has made distributions to investors are deposited into the general fund. Request Letter, at 4.

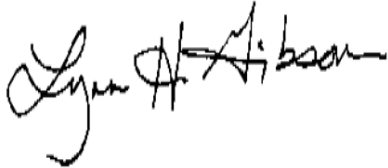
SEC’s authority to divert amounts into distribution funds, notwithstanding the miscellaneous receipts statute, is constrained by the plain language of the Remedies Act and the Sarbanes-Oxley Act. Those laws do not address postjudgment interest. The Remedies Act authorizes SEC to order “accounting and disgorgement, including reasonable interest” in any cease-and-desist proceeding to enforce the federal securities laws. See 15 U.S.C §§ 77h-1(e), 78u-3(e), 80a-9(f)(5) and 80b-3(j)(5); Request Letter, at 2 n. 4. SEC has interpreted the act as granting authority to collect prejudgment interest on disgorgement orders. See Request Letter, at 3 n.11. Section 308(a) of the Sarbanes-Oxley Act provides that in any administrative proceeding in which SEC obtains a civil penalty against a person for violation of the federal securities laws, “the amount of such civil penalty shall . . . at the direction of the Commission, be added to and become part of a [distribution] fund established for the benefit of the victims of such violation.” 15 U.S.C. § 7246(a). In addition, SEC is authorized to accept gifts of money, which “shall be deposited in such fund and shall be available for allocation in accordance with [section 308(a)].” 15 U.S.C. § 7246(b).

SEC asks us to infer from its general grants of authority under the provisions of the Remedies Act and the Sarbanes-Oxley Act, the authority to add postjudgment interest collected pursuant to 28 U.S.C. § 1961 to such distribution funds. We are unwilling to infer such an exception to the miscellaneous receipts statute. The miscellaneous receipts statute is one component of the statutory mosaic Congress has enacted to implement its constitutional power of the purse. The miscellaneous receipts statute controls agency spending by requiring that money received by the government be deposited into the Treasury, thereby making it unavailable for agency spending unless otherwise appropriated by Congress. See B-303413, Nov. 8, 2004, at 13. In light of the constitutional principles on which the miscellaneous receipts statute is grounded, a statutory exception must explicitly direct that an agency’s receipts be deposited in an account other than the general fund of the Treasury. See, e.g., B-302825, Dec. 22, 2004, at 4 (“a generally expressed grant of authority . . . is insufficient to supersede the miscellaneous receipts statute” particularly given its constitutional purpose).

We cannot presume that Congress intended an exception for postjudgment interest that accrues to the government, particularly where Congress has been specific otherwise as to the nature of the receipts that SEC can credit to distribution funds.

CONCLUSION

Because the postjudgment interest collected on money judgments enforcing administrative orders are monies for the government, the miscellaneous receipts statute requires that such monies be deposited into the general fund of the Treasury, absent specific statutory authority to dispose of such funds by alternate means. SEC should take appropriate action to withdraw any postjudgment interest deposited into distribution funds and deposit that interest into the general fund of the Treasury.

A handwritten signature in black ink, appearing to read "Lynn H. Gibson". The signature is written in a cursive, flowing style.

Lynn H. Gibson
General Counsel