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Annual Defense Spending Bill Includes Amendments Expanding SEC's Ability to Seek Disgorgement

On December 11, 2020, Congress passed the National Defense Authorization Act for Fiscal Year 2021, H.R. 6395 (the "NDAA"). The \$740.5 billion bill includes language amending the Securities Exchange Act of 1934 (the "Exchange Act") to provide the SEC with express statutory authority to seek disgorgement in civil enforcement actions pending in federal court. The amendments to the Exchange Act—which also double the statute of limitations for disgorgement from 5 to 10 years—are a direct Congressional response to limitations imposed by the Supreme Court in [Liu v. SEC, 140 S. Ct. 1936 \(2020\)](#) and [Kokesh v. SEC, 137 S. Ct. 1635 \(2017\)](#). President Trump has threatened to veto the bill over an unrelated provision, but it passed both Congressional chambers with veto-proof majorities, and could be enacted into law this month.¹

Although the Exchange Act does not explicitly authorize the SEC to seek "disgorgement," the SEC has long sought disgorgement of ill-gotten gains as a remedy in civil enforcement actions. This year, in *Liu*, the Supreme Court affirmed the SEC's right to seek disgorgement in civil actions pursuant to its statutory authority to seek "equitable relief." The Court, however, imposed several equitable limitations on disgorgement. Under *Liu*, the amount disgorged may not exceed the wrongdoer's net profits. The disgorgement must be obtained for the benefit of investors. And a disgorgement order against affiliates of the wrongdoer may or may not be permissible, depending on factors enumerated in the decision. Three years earlier, in *Kokesh*, the Court held that disgorgement was a "penalty" for statute of limitations purposes, and therefore that it was subject to the same 5-year statute of limitations as other "penalties" the SEC could seek, such as civil fines.

The proposed amendments in Section 6501 of the NDAA address and purport to correct several issues discussed by the Court in *Liu* and *Kokesh*. The bill disentangles disgorgement from civil penalties and equitable relief by providing the SEC with express statutory authority to seek "disgorgement . . . of any unjust enrichment by the person who received such unjust enrichment" in civil actions. The bill also provides a 10-year statute of limitations for the SEC to seek disgorgement in claims involving fraud, such as violations of Section 10(b) of the Exchange Act, although it reaffirms the 5-year limitations period to seek disgorgement for non-fraud claims. The proposed amendments would apply to any action or proceeding that is pending on, or commenced after, the date the NDAA is enacted.

If enacted, the NDAA will bolster the SEC's ability to seek disgorgement in civil actions, both by doubling the statute of limitations and by providing the SEC with express statutory authority to seek such a remedy. Nonetheless, the full scope and impact of these amendments remain to be seen, and will likely require case law development. For example, it will likely fall to the courts to determine whether the SEC's authority to

seek “disgorgement”—now untethered from the SEC’s separate authority to seek “equitable relief”—will continue to be bound by the equitable limitations identified in *Liu*. On the other hand, the statutory authorization to require disgorgement of any unjust enrichment “by *the person* who received such unjust enrichment” could limit the persons subject to disgorgement even more than the Supreme Court’s decision in *Liu*, which permitted the SEC to seek disgorgement against affiliates of the wrongdoer in certain circumstances.

We will continue to monitor the bill’s progress. The period during which the President may sign or veto the NDAA expires on December 23, 2020.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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¹ See <https://www.cnbc.com/2020/12/11/senate-passes-740-billion-defense-bill-as-trump-veto-threat-looms.html>