

National Defense Authorization Act provides for new statute of limitations and statutory authority for SEC-imposed disgorgement

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Hidden deep within the National Defense Authorization Act (“the Act”),¹ which passed on January 1, 2021 over President Trump’s veto, are new laws that extend the enforcement authority of the U.S. Securities and Exchange Commission (“SEC”). The Act includes new statutory authority for SEC-imposed disgorgement and a new 10-year statute of limitations that doubles the existing limitations period for such disgorgement. These new laws potentially impact recent Supreme Court rulings and expose entities subject to SEC scrutiny to a risk of larger disgorgement awards that may alter the decision to self-disclose to the enforcement agency.

Section 6501 (starting on page 1,238) of the Act provides the SEC with statutory authority to “require disgorgement” and creates a new 10-year statute of limitations for disgorgement for insider trading, fraud, and any other provision of securities laws “for which scienter must be established.”

These two additions may impact the Supreme Court’s recent rulings in *Kokesh v. SEC*² and *Liu v. SEC*.³ In *Liu*, the Supreme Court recognized that a statutory grant for the SEC to impose “equitable relief” (under 15 U.S.C. § 78u(d)(5)) provided the SEC with the authority to impose disgorgement. However, the Court also found that the SEC would be bound by “longstanding equitable principles” that would place limitations on the imposition of disgorgement, such as restricting disgorgement awards to a wrongdoer’s actual illicit profits, which in turn allows for deductions for legitimate business expenses.⁴ It is unclear whether the new statutory authority explicitly granting the SEC the power to “require disgorgement” releases the SEC from any obligation to follow “longstanding equitable principles,” but companies should expect that the SEC may make such an argument.

The new statute of limitations also impacts the *Kokesh* ruling. The Supreme Court in *Kokesh* recognized that the 5-year catch-all statute of limitations governing a “penalty” applies to limit the imposition of SEC-imposed disgorgement.⁵ The new 10-year statute of limitations doubles this 5-year limitations period, but importantly it does not extend to all securities laws. For example, securities laws that do not incorporate any scienter requirement, like the books and records or internal accounting control provisions, appear to still be subject to the 5-year statute of limitations referenced in *Kokesh*. As the SEC often imposes disgorgement for violations of these provisions in cases involving the Foreign Corrupt Practices Act, *Kokesh* is still an important constraint on SEC-imposed disgorgement.

Nonetheless, the longer statute of limitations also creates new risks to consider for companies subject to SEC authority. The extended limitations period exposes companies to larger disgorgement awards, which reinforces the need for companies to resolve red flags when they arise. Further, companies considering whether to disclose conduct under cooperation programs, like the U.S. Department of Justice’s FCPA Corporate Enforcement Policy, also will be forced to take into account this extended time period for SEC-imposed disgorgement. As even declinations under this Policy still require companies “to pay all disgorgement,” companies subject to SEC authority and considering whether to self-disclose must now weigh the costs resulting from disgorging profits for an additional 5-year period. Going forward, such companies need to bear in mind these developments with the SEC’s new enforcement power in evaluating their potential risk.

1 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R.6395, 116th Cong. (2021), <https://www.congress.gov/116/bills/hr6395/BILLS-116hr6395enr.pdf>

2 *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

3 *Liu v. SEC*, 140 S. Ct. 1936 (2020).

4 For more information regarding *Liu v. SEC* and related analysis, see Dentons' prior client alert discussing the ruling [here](#).

5 For more information regarding *Kokesh v. SEC* and related analysis, see Dentons' prior client alert discussing the ruling [here](#).

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