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Congress Sneaks in Expansion of SEC Disgorgement Authority in Annual Defense Bill



What does military policy have to do with the SEC? Tucked into the 1,480 page National Defense Authorization Act (NDAA) is a provision expanding the SEC's disgorgement authority.

The NDAA, specifying the budget and expenditures for the Department of Defense for fiscal year 2021 ([H.R. 6395](#)), was passed on December 11, 2020 by both chambers of Congress. Despite any obvious connection between the national defense and the SEC, the bill would amend the Securities Exchange Act of 1934 to give the SEC authority to seek disgorgement in enforcement actions brought in federal court. These amendments would also increase the statute of limitations for disgorgement from five to ten years. In relevant part, the NDAA (Section 6501) would amend the Exchange Act as follows:

(7) In any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement.

The Commission may bring a claim for disgorgement under paragraph (7)—

(i) not later than 5 years after the latest date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim occurs; or

(ii) not later than 10 years after the latest date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim if the violation involves conduct that violates . . . any [] provision of the securities laws for which scienter must be established.

With these amendments, the SEC would no longer be encumbered by the constraints imposed by the Supreme Court in *Liu v. SEC*, 140 S. Ct. 1936 (2020) (see [SEC Can Recover Disgorgement, With Limits](#)) and *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (see [Supreme Court Reins In SEC's Disgorgement Power](#)). The NDAA is currently before President Trump, who has threatened to veto the bill and has until December 23, 2020 to do so. But there

are sufficient votes in Congress to override any veto, and Congressional leaders have signaled they will return for such a vote before noon on January 3, 2021. Accordingly, the expansion of the SEC's enforcement authority to seek disgorgement appears secure.

Authors

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