King & Spalding
Client Alert

FEBRUARY 3, 2021

Government Matters

For more information, contact:

Russ Ryan
Washington, D.C.
+1 202 626 5457
rryan@kslaw.com

Matthew Baughman
Atlanta
+1 404 572 4751
mbaughman@kslaw.com

Carmen Lawrence
New York
+1 212 556 2193
clawrence@kslaw.com

Aaron Lipson
Atlanta
+1 404 572 2447
alipson@kslaw.com

Richard H. Walker
Washington, D.C.
+1 202 626 2620
rwalker@kslaw.com

Jessica Rapoport
Washington, D.C.
+1 202 626 5549
jrapoport@kslaw.com

Katie Barry
New York
+1 212 790 5365
kbarry@kslaw.com

Scott Hiers
Washington, D.C.
+1 202 626 9109
shiers@kslaw.com

Surprise Year-End SEC Disgorgement Legislation Settles Some Issues but Raises Others

The legitimacy and scope of the SEC's "disgorgement" remedy have been the focus of increasing scrutiny for the better part of the past decade.[1] Among other things, two Supreme Court decisions in the past four years placed significant limitations of the SEC's ability to pursue disgorgement in federal court proceedings. But most recently, Congress quietly slipped an improbable, eleventh-hour amendment into this year's must-pass National Defense Authorization Act (NDAA) that largely upended those two Supreme Court decisions.[2] With no debate or meaningful scrutiny, that amendment became law on New Year's Day when Congress overrode a presidential veto of the NDAA that had nothing to do with SEC disgorgement.

This alert builds upon on our prior analyses of developments in this area, briefly summarizes the relevant legal context, and provides our analysis of where SEC disgorgement law now stands and what may lie ahead.[3]

BACKGROUND AND CONTEXT

As we have discussed in our prior alerts, the SEC has sought disgorgement of illicit gains for more than half a century, and federal courts have routinely granted it as a form of "equitable" relief. Courts initially found disgorgement to fall within their inherent equitable powers as a remedy ancillary to the injunctions also typically sought by the SEC under its explicit statutory authority. When the Sarbanes-Oxley Act of 2002 expressly authorized "any equitable relief that may be appropriate or necessary for the benefit of investors,"[4] the SEC and courts were further emboldened to impose disgorgement.[5]

The SEC suffered its first major disgorgement setback in 2017, when the Supreme Court in *Kokesh v. SEC* unanimously rejected the agency's long-standing position that disgorgement claims should not be subject to any statute of limitations.[6] The Court held instead that SEC disgorgement awards are a form of "penalty" and therefore subject to the five-year limitations period codified at 28 U.S.C. § 2462. In a footnote, the Court

expressly left open the threshold questions of whether federal courts possessed authority to order disgorgement in SEC cases at all and whether they had been properly applying disgorgement in such cases.[7]

The Court largely answered *Kokesh*'s deferred questions in its decision last year in *Liu v. SEC*.[8] There, the Court held that a disgorgement award is a permissible form of "equitable relief" when it "does not exceed a wrongdoer's net profits and is awarded for victims."[9] The Court went on to suggest that disgorgement awards exceed the permissible bounds of equity if they fail to net out legitimate expenses incurred in producing the illicit gains, if they impose joint and several liability for illicit gains realized by unrelated co-defendants, or if the disgorged funds are not returned to harmed investors but instead are simply deposited in the U.S. Treasury, as is often the case in SEC proceedings.[10] In our earlier analysis of the *Liu* decision, we highlighted many of the thorny questions that the Court left open for resolution through subsequent litigation, many of which remain unanswered today.[11]

NEW LEGISLATION

Following the Supreme Court's *Kokesh* decision, and while the *Liu* case was still pending in the lower courts, SEC officials began expressing concern that *Kokesh* had prevented the agency from obtaining over $1 billion in disgorgement awards that were now time-barred and that the case, through a footnote, had invited litigants to challenge whether the agency could collect disgorgement at all.[12] Soon thereafter, legislators introduced bills in both the House and Senate designed to remove any lingering doubt about the permissibility of disgorgement in SEC cases and to extend the applicable statute of limitations for disgorgement. The House bill – which included a lengthy 14-year statute of limitations for disgorgement claims and would also have authorized the SEC to seek restitution of investor losses in certain cases[13] – passed by a comfortable bipartisan vote in November 2019. But its Senate counterpart – which included a 10-year statute of limitations claim for scienter-based disgorgement claims and did not include the restitution provision[14] – largely stalled in the upper chamber, leading most observers to assume that no change in the law would result from the 116th Congress.

To nearly everyone's surprise, however, legislation closely resembling the stalled Senate disgorgement bill resurfaced in an unlikely place. It was buried in the final version of this year's 1480-page National Defense Authorization Act (NDAA), just days before the bill overwhelmingly passed both houses of Congress.[15] This last-minute addition to the NDAA amended Section 21(d) of the Securities Exchange Act of 1934 by explicitly authorizing the SEC to seek disgorgement in federal courts and by specifically codifying a statute of limitations for disgorgement and certain other SEC remedies. More specifically, it applies a 10-year statute of limitations to claims for SEC "equitable" remedies and to scienter-based disgorgement claims, and a five-year statute of limitations for non-scienter-based disgorgement claims.[16] No previous version of the NDAA had included these SEC disgorgement provisions and they were not explained in the final conference report that quietly added them to the overall bill in early December. We have found only a single sentence in the Congressional Record that even vaguely alluded to these provisions before the final vote,[17] suggesting that many legislators may have been completely unaware of their last-minute insertion into the otherwise unrelated defense spending bill.

QUESTIONS ANSWERED, NEW ONES RAISED

The NDAA's disgorgement provisions amended section 21(d) of the Securities Exchange Act by – for the first time ever – explicitly adding disgorgement to the SEC's toolbox when it files enforcement charges in federal court and codifying an explicit statute of limitations.[18] In doing so, however, the legislation left many questions unanswered. We discuss some of these unanswered questions below.

1. What (if anything) remains of Liu?

Although the new legislation explicitly authorized disgorgement, it neither defined that concept nor clearly delineated its contours. The Supreme Court in *Liu* had recently clarified that a permissible SEC disgorgement award is limited to an amount reflecting a wrongdoer's personal illicit gains that is awarded to victim investors.[19] More specifically, the Court emphasized the need to net out legitimate business expenses associated with illicit gains, cautioned against imposing joint and several liability for disgorgement absent a close relationship between co-participants, and strongly suggested that the SEC must stop depositing disgorgement recoveries into the U.S. Treasury rather than returning those funds to harmed investors.[20]

The NDAA did not explicitly ratify these limitations, but it also did not explicitly reject them. And due to the absence of post-*Liu* legislative history, there is nothing to shed light on how – or even whether – Congress intended to reconcile the new legislation with *Liu*. The closest the NDAA comes to defining disgorgement is a reference to "unjust enrichment by the person who received such unjust enrichment as a result of [the] violation," which seems largely consistent with *Liu* calling disgorgement a "profits-based measure of unjust enrichment."[21]

On the familiar notion that Congress is aware of current judicial interpretations of its laws – prominent recent Supreme Court interpretations especially – and typically does not "hide elephants in mouseholes,"[22] litigants may persuasively argue that the NDAA merely codified the remedy of disgorgement that the Court had carefully articulated in *Liu*. We suspect, however, that the SEC may take the position that the NDAA effectively removed *Liu*'s limitations on disgorgement, although even the SEC might have to concede that under the above-quoted literal text of the NDAA ("unjust enrichment *by the person who received such unjust enrichment*"), disgorgement still must be limited to the illicit gains personally received by any particular defendant with a deduction of legitimate business expenses. While *Liu*'s definition of disgorgement based on "net profits" is a different phrasing than the NDAA's "unjust enrichment," it would seem that legitimate business expenses should not be considered "unjust" and therefore should continue to be netted out even under the NDAA.

Following *Liu*, we predicted that the SEC would still be able to obtain joint-and-several liability judgments against co-defendants in some circumstances, noting that while the Court opined that imposing such liability was "sometimes seemingly at odds with the common-law rule requiring individual liability for profits" that could "transform any equitable profits-focused remedy into a penalty," the common law provided an exception to this principle for partners engaged in "concerted wrongdoing."[23] However, the NDAA's language potentially closes that door. The above-discussed text of the NDAA provides that disgorgement may be sought in the amount of "any unjust enrichment *by the person who received such unjust enrichment* as a result of such violation."[24] This language could be read to implicitly limit unjust enrichment-based disgorgement to funds received by a specific individual, and thus cabin the SEC's ability to seek and obtain joint-and-several liability. Relatedly, the NDAA leaves open the question of whether the SEC can continue to seek disgorgement from relief defendants who did not engage in wrongdoing but instead received illicit gains that resulted from violations committed by others.[25] Our observation following *Liu* was that the Court's opinion potentially supported both sides of that debate.

2. Is disgorgement still an equitable remedy?

For decades, the SEC and lower courts have consistently described disgorgement as an inherently equitable remedy. Indeed, that was the only plausible basis on which it could ever have been justified before enactment of the NDAA. Here, too, the text of the NDAA is inconclusive. Read most logically, the statute appears to dispel any notion that disgorgement is an equitable remedy; one of its provisions, titled "Equitable Remedies," creates a new 10-year statute of limitations for "any equitable remedy, including for an injunction or for a bar, suspension, or cease and desist order," with disgorgement conspicuously not mentioned.

Then again, the statute does not explicitly say that disgorgement is *not* equitable. And the mere fact that the remedy is now codified by statute is not necessarily dispositive. After all, Congress has previously codified other SEC remedies that were previously considered equitable – such as injunctions and officer/director bars – yet those remedies are still widely considered equitable despite their statutory codification.

Whether disgorgement remains an equitable remedy is far from an academic question. It has practical implications and will eventually need to be answered. For example, although SEC injunctions are still widely considered equitable in nature, courts have generally excused the SEC from proving several conditions historically deemed necessary to obtain injunctive relief in equity – such as ongoing or imminent unlawful conduct, irreparable harm, and inadequacy of available remedies at law – and instead have routinely granted injunctions whenever the SEC merely shows a past violation and a reasonable likelihood of recurrence.[26]

At the same time, based mostly on the premise that disgorgement was an equitable remedy (albeit uncodified), the SEC has successfully convinced courts to grant it significant procedural and evidentiary advantages when pursuing claims for disgorgement. For example, the SEC has generally been required to proffer only a "reasonable approximation" of the alleged ill-gotten gains, at which point courts typically shift the evidentiary burden to the defendant to *disprove* the SEC's proffered approximation.[27] Likewise, the SEC and many courts have cited the equitable nature of disgorgement to justify depriving defendants of a jury trial,[28] imposing contempt sanctions against defendants who fail to pay their disgorgement awards,[29] requiring defendants to pay prejudgment interest on disgorgement amounts,[30] and dispensing with the protections normally afforded to judgment debtors under the Federal Debt Collections Act.[31] If disgorgement is no longer considered an equitable remedy in light of the NDAA, most or all of these legacy SEC advantages arguably should no longer apply. But if disgorgement is still equitable and Congress has merely provided statutory authority to obtain that equitable remedy, these advantages could arguably endure.

3. Does disgorgement in federal courts now differ from disgorgement in administrative proceedings?

In his lone dissent in *Liu*, Justice Thomas asked whether the majority's restrictions on disgorgement would apply in administrative enforcement proceedings as well as in federal court cases.[32] If not, Justice Thomas observed, the result would be that disgorgement "has one meaning when the SEC goes to district court and another when it proceeds in-house."[33] We previously flagged this open question, noting that the potential inconsistency arose out of the tension between the Supreme Court's construct of disgorgement as an equitable remedy in district court cases and the fact that the Exchange Act provides the SEC with separate, explicit statutory power to seek disgorgement in administrative proceedings. We predicted that, theoretically, this distinction could lead the SEC to make more frequent and aggressive use of its administrative forum when seeking disgorgement, especially in settled cases.[34]

However, now that disgorgement has a statutory basis in both district court and administrative proceedings, the tension between the two may be diminished. The text of new Exchange Act Section 21(d)(3)(B), which now authorizes disgorgement, differs slightly from existing Section 21C(e) – which applies only to administrative proceedings:

> Section 21(d)(3)(B): "[the SEC may] require disgorgement . . . of any unjust enrichment by the person who received such unjust enrichment as a result of such violation."
>
> Section 21C(e): "[the SEC may] enter an order requiring accounting and disgorgement, including reasonable interest."

The remaining inconsistency in the language leaves some question as to whether the scope of the SEC's authority to seek disgorgement in district court differs from the scope of the agency's authority in administrative proceedings. One open question, discussed below, is whether the SEC can still obtain prejudgment interest in both venues.

4. Does the NDAA now preclude awards of prejudgment interest on disgorgement awards in federal court?

Even if the SEC takes the position that disgorgement remains an equitable remedy, the NDAA raises serious textualist doubts about whether the SEC can continue to demand prejudgment interest on disgorgement awards in federal court, as it has in the past based on principles of equity. As quoted above, the statute is silent about prejudgment interest, in stark contrast to its existing statutory counterpart that explicitly provides for prejudgment interest on disgorgement amounts ordered in SEC administrative proceedings.[35] Given the absence of legislative history on the issue, the SEC's anticipated argument that Congress could not have intended to eliminate prejudgment interest on disgorgement awards may fall on deaf ears with textualist federal judges. Again, this issue is neither academic nor insignificant. Should the SEC actually begin reaching back up to 10 years with its disgorgement demands, prejudgment interest calculations could easily add up to at least half of the disgorgement principle itself.

5. How does the NDAA impact the SEC's authority to seek disgorgement in cases where victims are difficult to identify?

After *Liu*'s observation that victim compensation was a component of making disgorgement an equitable remedy, we predicted that obtaining disgorgement awards may prove problematic in cases where identifying victims and returning funds to them is difficult.[36] We noted that in classical insider trading cases, for example, it can be difficult to trace the precise securities bought or sold to individual purchasers or sellers who were, at least theoretically, the victims of the unlawful transaction. In misappropriation-based insider trading cases, we noted, the victim is typically the entity or person from whom the information was misappropriated, but gains by the perpetrator may not have been taken from this putative victim's pockets. And in Foreign Corrupt Practices Act cases, the "victims" typically are not the offending company's investors but rather any number of third parties, including foreign governments, citizens of foreign nations, or even competing businesses put at a disadvantage by the unlawful conduct.

Liu's requirement that ill-gotten gains be "awarded for victims" – interpreting statutory language that authorizes equitable relief "for the benefit of investors" – put the SEC in a bind, as it seemingly required the Commission to find a way to return disgorged funds to investor-victims harmed by the charged misconduct. As discussed above, this arguably remains an open question even after the NDAA.

6. How will the NDAA affect pending cases and investigations?

According to the NDAA, the new disgorgement provisions apply to "any action or proceeding that is pending on, or commenced on or after, the date of enactment of this Act."[37] We expect litigants to challenge any SEC attempt to invoke the NDAA in pending cases to shore up disgorgement claims that do not comply with the five-year time limits of *Kokesh* or the equitable principles set forth in *Liu*. We were cautiously optimistic that, in the spirit of fairness and good faith, the SEC and its staff will respect the legitimate expectations of investigative subjects and their counsel in advanced-stage investigations and pending litigation regarding the relevant time periods under scrutiny, the nature and amount of disgorgement at issue, and the intent of any tolling agreements previously entered into. However, early indications suggest the SEC may seek to apply the new 10-year limitations period even to cases already pending in court.[38]

7. How much will the NDAA actually affect the SEC's approach to disgorgement?

In many respects, the NDAA is a potential game-changer for SEC enforcement. If courts construe the legislation as removing the limitations placed on disgorgement by the Supreme Court's recent decision in *Liu*, we might expect to see new levels of SEC aggressiveness in seeking disgorgement going forward – the exact opposite of what we had been observing in the months since *Liu*. If, on the other hand, courts maintain the limitations imposed by *Liu*, the statutory codification of disgorgement could have far less impact on the SEC's approach.

While *Kokesh*'s five-year statute of limitations lives on as the default rule for SEC disgorgement, the NDAA establishes a 10-year limitations period for the SEC to seek disgorgement for violations of Section 10(b) of the Exchange Act, Section 17(a)(1) of the Securities Act of 1933, Section 206(1) of the Investment Advisers Act of 1940, and a catchall " any other provision of the securities laws for which scienter must be established."[39] If the express use of the term "scienter" in the statutory text seems peculiar, that's because it is. A search of the U.S. Code reveals that "scienter" appears in only one other place—in a statute about spam email—and only as part of a subsection heading.[40] This represents a departure from Congress's standard drafting practice when codifying a mental state required for liability. For example, the U.S. Code uses "knowing" or "knowingly" 1,555 times, and "willful" or "willfully" 1,200 times, but does not otherwise use the term "scienter."

The NDAA's failure to explicitly define scienter should lead to the result that its meaning will continue to be defined by judicial interpretations, most notably whether proof of recklessness is sufficient to establish scienter. Although there is general consensus among the federal circuit courts that scienter can be established by proof of recklessness, the Supreme Court has never definitively ruled on that issue[41] and some members of Congress have at times expressed disagreement.[42] But because the NDAA's 10-year statute of limitations provision expressly identifies by section numbers the three scienter-based antifraud statutes most commonly charged in SEC enforcement cases, before adding its catch-all coverage for "other" scienter-based violations, any future uncertainty over the meaning and scope of scienter likely would not put in doubt the applicability of the 10-year limitations to disgorgement claims in cases charged under those three identified antifraud statutes.

The NDAA's 10-year statute of limitations for scienter-based violations may be especially game-changing because its clock doesn't begin to run until the *latest* date on which a violation occurred (in contrast to the five-year clock of 28 U.S.C. § 2462, which begins to run when a claim *first* accrues). For most practical purposes and in most cases, this 10-year statute of limitations effectively allows the SEC unlimited time to investigate, particularly given the relative ease with which the SEC can already extend its time limits through tolling agreements. The lack of any meaningful investigative time limit is even more apparent for the SEC's foreign investigative targets, because the NDAA explicitly excludes from the time calculation all periods in which the defendant was outside the United States.[43]

Despite the obvious concerns raised by hypothetically endless investigations, we suspect that the SEC will be judicious in how it employs its new limitations period. To be sure, the NDAA will embolden Commission staff to reach back further in time for disgorgement in cases it was already inclined to pursue, and it unfortunately eliminates one of the strongest incentives the staff previously had in terms of moving investigations forward with alacrity and focus. But we seriously doubt the SEC will begin dusting off previously time-barred cases or will develop a sudden interest in finding new cases with conduct already more than five years old. SEC leadership is well aware that cases don't improve with age and that the message and deterrent value of those cases erode quickly with the lapse of time.

Perhaps more importantly, the SEC typically demands civil monetary penalties in its enforcement cases. The NDAA left fully intact the five-year limitations period that applies to penalty demands, which should preserve some sense of urgency despite the NDAA's longer limitations period for equitable remedies and scienter-based disgorgement claims. In this regard, we were already encouraged by recent comments from SEC leaders emphasizing their desire to reduce the duration of investigations rather than prolonging them.[44]

CONCLUSION

The availability and appropriateness of SEC disgorgement has been the subject of vigorous debate since *Kokesh*'s infamous Footnote 3. While courts were just beginning to iron out the contours of post-*Liu* disgorgement, Congress intervened by granting to the SEC explicit statutory authority for what the Commission had for decades obtained in

equity. In doing so, as the preceding analysis demonstrates, Congress has reopened old questions and raised many new ones that will likely take years to resolve through subsequent litigation and potential additional legislation.

[1] *See, e.g.*, Russell G. Ryan, ***The Equity Façade of SEC Disgorgement***, 4 HARV. BUS. L. REV. ONLINE 1 (2013).
[2] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 ("NDAA"), Pub. L. 116-283, § 6501, 134 Stat. 3388 (2021) ("NDAA").
[3] K&S Client Alert, ***Reflections on*** Kokesh v. SEC***: Potential Ramifications of SEC Disgorgement Being a Penalty***, June 14, 2017; K&S Client Alert, ***Reflections on*** Kokesh v. SEC***: On the Lookout for "Elephants in Mouseholes,"*** Feb. 9, 2018; K&S Client Alert, ***The Lasting Impact of*** Kokesh***: Footnote 3 and Beyond***, Sept. 16, 2019; K&S Client Alert, ***What is New After*** Liu***: Unsettled Questions Surrounding SEC Disgorgement***, July 10, 2020.
[4] 15 U.S.C. § 78u(d)(5).
[5] Unlike actions brought in federal court prior to passage of the NDAA, disgorgement in SEC administrative proceedings is expressly authorized by statute, as discussed later.
[6] *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).
[7] *Id*. at 1642 n.3.
[8] *Liu v. SEC*, 140 S. Ct. 1936 (2020).
[9] *Id.* at 1940.
[10] *Id.* at 1949-50.
[11] K&S Client Alert, ***What is New After*** Liu***: Unsettled Questions Surrounding SEC Disgorgement***, July 10, 2020.
[12] *See, e.g.*, *Oversight of the SEC: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 116th Cong. (2020) (statement of Jay Clayton, Chairman, SEC); U.S. Secs. and Exch. Comm., Div. of Enf't, 2019 Annual Report at 21, Nov. 6, 2019.
[13] Investor Protection and Capital Markets Fairness Act, H.R. 4344, 116th Cong. (2019).
[14] Securities Fraud Enforcement and Investor Compensation Act of 2019, S. 799, 116th Cong. (2019).
[15] National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (2020) (enacted).
[16] The 10-year limitations period that applies to equitable remedies without scienter includes injunctions, bars, suspensions and cease and desist orders as examples. NDAA, § 6501(a)(3). The five-year limitations period for actions seeking civil penalties, established in *Gabelli v. SEC*, stands strong. *See Gabelli*, 568 U.S. 442 (2013).
[17] 166 CONG. REC. H6907 (daily ed. Dec. 8, 2020) (statement of Rep. Waters), at H6926 ("These bills would . . . provide more remedies to investors who were deceived by corporate wrongdoers").
[18] The Commission has had explicit authority to order disgorgement in administrative proceedings since the enactment of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990. *See, e.g.*, 15 U.S.C. § 78u-3(e).
[19] *Liu*, 140 S. Ct. at 1940.
[20] *Id.* at 1949-50.
[21] NDAA, § 6501(a)(1); *Liu*, 140 S.Ct. at 1936-37.
[22] *See, e.g.*, *Whitman v. Am. Tracking Ass'ns*, 531 U.S. 457, 468 (2001).
[23] K&S Client Alert, ***What is New After*** Liu***: Unsettled Questions Surrounding SEC Disgorgement***, July 10, 2020 (citing *Liu*, 140 S. Ct. at 1949).
[24] NDAA, § 6501(a) (emphasis added).
[25] *Id.*; K&S Client Alert, ***Reflections on Kokesh v.*** SEC***: Potential Ramifications of SEC Disgorgement Being a Penalty***, June 14, 2017.
[26] *See, e.g.*, *Aaron v. SEC*, 446 U.S. 680, 703 (1980); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1975).
[27] *See, e.g.*, *SEC v. Whittemore*, 659 F.3d 1, 7 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 935 (2012); *SEC v. Happ*, 392 F.3d 12, 31 (1st Cir. 2004); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231–32 (D.C. Cir. 1989) (citing cases from other circuits).
[28] *See, e.g.*, *SEC v. Rind*, 991 F.2d 1486, 1493 (9th Cir. 1993); *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 94-96 (2d Cir. 1978).
[29] *See, e.g.*, *SEC v. Huffman*, 996 F.2d 800, 803 (5th Cir. 1993) (disgorgement order is enforceable by contempt because it is "more like a continuing injunction in the public interest than a debt" (citing Pi*erce v. Vision Investments, Inc.*, 779 F.2d 302, 307–08 (5th Cir. 1986))); *SEC v. Goldfarb*, 2012 U.S. Dist. LEXIS 85628, at *10–17 (N.D. Cal. 2012) (contempt available).
[30] *See, e.g.*, *SEC v. Tourre*, 4 F. Supp. 3d 579, 591 (S.D.N.Y. 2014); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476 (2d Cir. 1996).
[31] *See, e.g.*, *Huffman*, 996 F.2d at 802-03.
[32] *Liu*, 140 S. Ct. at 1954 (Thomas, J., dissenting).
[33] *Id*.
[34] K&S Client Alert, ***What is New After*** Liu***: Unsettled Questions Surrounding SEC Disgorgement***, July 10, 2020.
[35] *See, e.g.*, 15 U.S.C. § 78u-3(e).
[36] K&S Client Alert, ***What is New After*** Liu***: Unsettled Questions Surrounding SEC Disgorgement***, July 10, 2020.
[37] NDAA, § 6501(b).
[38] *See* SEC Letter to Judge Preska re: Notice of Applicability of Amended Statutes of Limitations, *SEC v. Joshua Sason, et al.*, 19 Civ. 1459 (LAP) (S.D.N.Y. Jan. 29, 2021) (seeking belatedly to extend disgorgement claim back to periods previously time barred by *Kokesh*).
[39] NDAA, § 6501(a)(3).
[40] 15 U.S.C. § 7706(f)(9) ("Requisite scienter for certain civil actions").
[41] *See, e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *Aaron v. SEC*, 446 U.S. 680, 685 n.5 (1980); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 47 (2011).
[42] *See, e.g.*, 144 CONG. REC. H10771-02 (daily ed. Oct 13, 1998) (statements of Reps. Bliley and Cox), at H10775, H10780.
[43] The NDAA is worded differently than 28 U.S.C. § 2462 ("[A]n action … for the enforcement of any civil fine, penalty, or forfeiture … shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."). *Compare with* NDAA, § 6501(a)(3) ("For the purposes of calculating any limitations period … any time in which the person against which the action or claim … is brought is outside of the United States shall not count towards the accrual of that period.").

[44] *See, e.g.*, Stephanie Avakian, Director, SEC Div. of Enf't, Address at the University of Pennsylvania Carey Law School's Institute for Law and Economics (Sept. 17, 2020) ("[W]e are employing strategies to streamline these investigations in an effort to substantially accelerate the pace of our investigations. This has come through a purposeful effort by our investigative teams to efficiently triage issues, increase staffing, make more targeted requests at the outset, substantively engage early with relevant parties, and leverage cooperation. We have already seen some success in our acceleration efforts and expect to see those successes continue in the near and long term.").

kslaw.com
