

## Publications

# SEC's expanded ability to seek disgorgement upheld



## Securities Enforcement Alert

Share this   

28 September 2022

By: [Eric Forni](#) | [Deborah R. Meshulam](#) | [John M. Hillebrecht](#)

In recent months, the SEC has made clear that its enforcement priorities include **robust remedies**. And now, a recent District of Massachusetts court decision interpreting the National Defense Authorization Act of 2021's (NDAA) amendments to the Securities Exchange Act of 1934 (Exchange Act) – which, among other things, extended the SEC's statute of limitations for disgorgement from five years to ten years in intentional fraud cases – may provide the SEC with further ammunition to collect significant monetary sanctions.

### Background

On January 1, 2021, Congress enacted the NDAA, which was passed in the wake of two Supreme Court cases – *Kokesh* and *Liu* – that interpreted and narrowed the SEC's ability to seek disgorgement. See prior alerts summarizing the [NDAA](#), [Kokesh](#) and [Liu](#).

The NDAA amendments to the Exchange Act, among other things, established a ten-year statute of limitations for SEC disgorgement premised on violations that involve knowing or reckless (ie, *scienter*-based) conduct for cases “pending on, or commenced on or after,” January 1, 2021. The NDAA also revised the Exchange Act to state that the “Commission may seek a claim for any equitable remedy, including for an injunction or for a bar, suspension, or cease and desist order, not later than 10 years after the latest date on which a violation that gives rise to the claim occurs.”

But, after the NDAA amended the Exchange Act, litigants have argued that Congress's language was ambiguous and/or that the NDAA violated the *ex post facto* clause. These issues came to a head in *SEC v Sharp*.

### The *Sharp* case

On August 5, 2021, the SEC filed a **complaint** alleging a multiyear, international stock fraud perpetrated against US financial markets and retail investors by various foreign and domestic actors. The SEC's allegations involved *scienter*-based conduct occurring from at least ten years prior to the filing of the complaint. The SEC sought disgorgement for the full ten-year period (as well as injunctions).

Several of the defendants moved to dismiss or at least limit the scope of the SEC's allegations, arguing that the NDAA was inapplicable. Specifically, these defendants argued that claims based on conduct between 2011 and August 2016 were untimely because the NDAA's new statute of limitations could not apply retroactively to revive purportedly stale claims. On September 6, 2022, in a 104-page decision, the district court denied the motions to dismiss, stating clearly:

This Court holds that the NDAA's ten-year statute of limitations on disgorgement for scienter-based claims applies retroactively to both cases pending on and cases commenced after its passage, because the statute contains an express retroactivity command from Congress.

### Related topics

[Complying with the regulators](#)

### Related services

[Litigation, Arbitration and Investigations](#)

[Corporate and Securities Litigation](#)

[White Collar and Corporate Crime](#)

[Regulatory and Government Affairs](#)

[US Law and Policy](#)

Sign up for our  
newsletters and  
alerts

The Court also held that the “NDAA applies retroactively as to equitable remedies including injunctions . . .”.

The *Sharp* case is significant because it addresses the application of the NDAA to cases *commenced on or after* the NDAA was passed, which was a matter of first impression in the First Circuit (compare with *SEC v Kellen*, No. CV 20-3861-RSWL-AGR, 2021 U.S. Dist. LEXIS 204153 (C.D. Cal. Sep. 14, 2021), which concerned a *pending* action when the NDAA was passed; there, the court concluded that the NDAA does, in fact, apply to cases that were pending in January 2021).

## Key takeaways

The *Sharp* case marks a key win for the SEC, which argued that the NDAA expressly enabled it to pursue disgorgement for conduct that occurred within the last ten years for any case pending on, or commenced after, January 2021. But the case has deeper implications that should be considered by any SEC current or prospective defendant, as well as persons facing DOJ scrutiny in parallel cases:

- The SEC is likely to take the position that it can collect disgorgement from time periods even beyond ten years in cases involving foreign defendants because of the NDAA’s tolling provision providing that “any time in which the person against which the action or claim, as applicable, is brought is outside of the United States shall not count towards the accrual of that period.”
- The SEC often seeks an asset freeze to preserve assets deemed necessary to satisfy a future judgment. Asset freeze orders can be based on the total amount of disgorgement (and penalty) to which the SEC believes it would be entitled if it prevails. Further, the SEC is not required to trace funds from an alleged fraud in order to obtain disgorgement. *Sharp* provides precedent for the SEC to seek expanded asset freeze orders based on alleged misconduct spanning over at least 10 years prior to the filing of a complaint after the NDAA was passed. Litigants and third-party asset custodians should consider whether, in the face of a potential asset freeze as to which they have received notice, it makes strategic sense to conduct proactive discussions with the SEC regarding the scope of that asset freeze.
- The SEC’s win in *Sharp* may cause the agency to aggressively pursue other arguably untested aspects of the NDAA’s amendments, such as seeking robust disgorgement orders even in cases where the SEC cannot identify victims to whom funds should be returned. Indeed, the Court noted that there is “confusion as to whether the SEC can now seek disgorgement for any unjust enrichment, or whether it is still cabined by the wrongdoer’s profits. [The NDAA] has also opened questions as to whether the SEC must return funds to the defendant’s victims or whether it can place those disgorged funds into the Treasury.”
- The *Sharp* case also may have implications in parallel criminal investigations as the SEC and DOJ routinely coordinate and share information. Although the DOJ is generally limited to bringing securities fraud cases within six years of the conduct, the SEC’s ability to file claims for disgorgement (and other equitable relief) for conduct that occurred ten years ago (or longer) may (a) lead the SEC to investigate, obtain and share additional evidence with the DOJ that it can use to broaden conspiracy charges, identify related conduct during sentencing proceedings or increase forfeiture demands and/or (b) provide further opportunities for subjects and targets to cooperate with ongoing criminal investigations by providing what may have been viewed historically as stale information.
- *Sharp* may also incentivize whistleblowers to file claims for older conduct seeking significant SEC awards.

Find out more about the implications of the NDAA’s amendments to the Exchange Act by contacting any of the authors or your DLA Piper relationship partner.

Share this   

## Authors



