In *Liu* of Disgorgement: A Call to Revise the SEC's Civil Remedy Toolkit to Effectively Deter Market-Harming Securities Law Violations

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ABSTRACT: The Securities & Exchange Commission ("SEC") was established to protect investors and the integrity of our capital markets. To further its protectionary role, the SEC can bring civil enforcement proceedings and has authority to seek disgorgement of a defendant's ill-gotten profits on behalf of victims affected by violations of the federal securities laws. While the SEC's mission is a noble one, the authority to seek disgorgement largely originated in equity and must conform to traditional notions of equitable relief—posing a unique challenge to discrete violations of securities laws with no readily ascertainable victims. Where a beneficiary of disgorged funds was a typical antecedent in a claim for equitable disgorgement, attempting to "disgorge" profits when it is impossible to tell from whom the profits originated effectively commissions a "modern" chapter in traditional equity jurisprudence. To preserve the SEC's role as a market protector and prevent the courts from rewriting equity's history, this Note argues that a different mechanism to calculate civil penalties should be implemented in response to violations that are incompatible with disgorgement—allowing the SEC to prevent wrongdoers from retaining the proceeds of their conduct and efficiently deterring future violations of the federal securities laws.

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INTRODUCTION

Picture this—

You and your band of criminally inclined chefs have been participating in "Thievesgiving" over a span of ten years. Wines are from California, dough is from New Jersey, corn is from Iowa, lobster is from Maine, oranges are from Florida, and the cheese, of course, is from Wisconsin. Indeed, there are only two requirements to attend Thievesgiving: (1) Each of the ingredients in whatever you make must come from a different grocery store in a different state; and (2) all of the ingredients must be *stolen.* After the most recent Thievesgiving, federal law enforcement catches wind and brings you in for questioning. You crack and, unable to maintain the thieves' code any longer, divulge the intricacies of your scheme. After explaining your role in misappropriating ingredients from an innumerable amount of scattered and unknown grocery stores, the agent sitting across from you demands that you "disgorge" all the ingredients so that they may be returned to the stores.

Confused, you reply: "But that's . . . impossible.[1] Couldn't I just pay you for the value of what I stole?" After taking a pause to consider the marching orders from Washington, the agent accepts the cash you have on you and begins rationing it in small incremental piles. Again, confused, you ask: "Are you really going to try to track down a food cart in Florida to pay them $0.70 for an orange I stole eight years ago?" Without lifting their head, the agent responds: "Well, I can't keep it! The Director was very clear that I may only disgorge you of your unlawful gains."

It is an imperfect analogy but you get the gist. You, a market-harming[2] wrongdoer, have engaged in unlawful conduct and derived a benefit, at which point a federal agency steps in and attempts to return the unlawful gains to a limited class of victims through disgorgement—even where it is infeasible to identify who has been harmed. Over the last decade, the U.S. Securities & Exchange Commission ("SEC") has become increasingly reliant on disgorgement,[3] both as a necessary mechanism to achieve deterrence-based judgements and as a vehicle to return money to investors who have been harmed by violations of the federal securities laws.[4] With over half of U.S. households investing in the stock market,[5] millions of American families are dependent on the SEC and its ability to ensure the safety of their personal savings, pension funds, and employment benefits from bad actors in our capital markets.

However, the SEC's ability to deter wrongdoers from engaging in discrete instances of violative conduct is in jeopardy. Two recent Supreme Court cases have narrowed the scope of disgorgement through its inception as an equitable

1. *See* Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1, 10 (2013) ("[T]rue disgorgement should similarly mean that the defendant in fact possesses or at least has access to the asset being disgorged. Otherwise, calling the remedy 'disgorgement' is akin to a doctor advising an emaciated patient to disgorge last year's Thanksgiving dinner.").

2. This Note uses the term "market-harming" to conveniently describe violations of the securities laws that do not present a readily identifiable class of harmed investor-victims. Even though modern courts have identified classes of non-investor victims in some of the violations discussed below, see, e.g., *infra* note 129, this Note treats violations as effectively victimless (and thus "market-harming") whenever the SEC cannot readily return a wrongdoer's profits to a class of investors.

3. *See* Ryan, *supra* note 1, at 1 n.1; U.S. SEC. & EXCH. COMM'N, DIV. OF ENF'T, 2020 ANNUAL REPORT 17 [hereinafter 2020 ENFORCEMENT REPORT]. *But see* Press Release, Sec. & Exch. Comm'n, SEC Announces Enforcement Results for FY 2021 (Nov. 18, 2021), https://www.sec.gov/news/press-release/2021-238 [https://perma.cc/X3T7-PHJU] ("In fiscal year 2021 . . . the SEC also obtained judgments and orders for nearly $2.4 billion in disgorgement and more than $1.4 billion in penalties . . . represent[ing] a respective 33 percent decrease and 33 percent increase over amounts ordered in the prior fiscal year in these categories.").

4. *See* discussion *infra* Section IV.A.

5. *See* Kim Parker & Richard Fry, *More Than Half of U.S. Households Have Some Investment in the Stock Market*, PEW RSCH. CTR. (Mar. 25, 2020), https://www.pewresearch.org/fact-tank/2020/03/25/more-than-half-of-u-s-households-have-some-investment-in-the-stock-market [https://perma.cc/QP2U-2KFA].

remedy,[6] and Congress's subsequent attempt to preserve the SEC's remedial authority has fallen short.[7] This Note argues that the SEC's tenured reliance on disgorgement exposes it to significant procedural risk, where the SEC may be unable to secure deterrence-based judgements in market-harming violations that prove incompatible with disgorgement. Indeed, even litigating the scope of disgorgement will prove to be a drain on SEC resources, as the agency feels pressured to keep the remedy alive to accomplish its deterrence-based objectives. To remedy this problem, Congress should enact a comprehensive civil penalty scheme that is based on multiples of a wrongdoer's gross profits—escaping the need to fit disgorgement to incompatible circumstances and allowing the agency to efficiently serve its deterrence-based mission.

I. Background

Scholarly debate surrounds the origins of "disgorgement,"[8] its scope in SEC civil enforcement proceedings,[9] and how the 2021 National Defense Authorization Act ("The NDAA")[10] could impact its application going forward. Section II.A. will trace the history behind today's understanding of disgorgement, Section II.B. discusses a brief history of SEC remedies and how the Commission's application of disgorgement has evolved over time, and Section II.C. recounts how the disgorgement provision within The NDAA was passed into law.

A. The History Behind Disgorgement

Conventional wisdom says that "a wrongdoer should not be permitted to profit from his wrong."[11] Indeed, this is the maxim upon which application of disgorgement is routinely justified.[12] However, despite the judiciary's regular use of this truism as ammunition to bolster its reasoning that disgorgement falls under "those categories of relief that were *typically* available in equity,"[13] the modern discussion of disgorgement in civil proceedings does little to lay out the outer boundaries of the doctrine.[14] While legal relief will normally entail a request for monetary damages, equitable relief usually involves

6. *See* discussion *infra* Section III.A.

7. *See* discussion *infra* Section III.B.

8. *See* Liu v. SEC, 140 S. Ct. 1936, 1951 (2020) (Thomas, J., dissenting) (noting the term was first seen in legal opinions from the twentieth century). *But see* Caprice L. Roberts, *Supreme Disgorgement*, 68 FLA. L. REV. 1413, 1427–28, 1427 n.91 (2016) (equating "disgorgement" with "accounting of profits"—a remedy with historic roots in restitution and applied in common law courts of equity); Ryan, *supra* note 1, at 12 ("[T]he very label of disgorgement is a misnomer[.]").

9. Ryan, *supra* note 1, at 3–4.

10. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. § 6501 (2021) [hereinafter The NDAA].

11. PETER JAFFEY, THE NATURE AND SCOPE OF RESTITUTION 12 (2000); *see Liu*, 140 S. Ct. at 1943.

12. JAFFEY, *supra* note 11, at 363.

13. Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993); *Liu*, 140 S. Ct. at 1942.

14. Ryan, *supra* note 1, at 1 n.3, 2.

"requiring a person take or stop a certain action."[15] As such, treating disgorgement as a purely equitable remedy where a person is *required* to return *money* can be an uncomfortable exercise; however, the distinction becomes clearer by examining the principles underlying restitution[16]—the remedy under which disgorgement derived much of its meaning.

The rationale behind disgorgement is not a new concept and began to take form under the doctrine of restitution.[17] Restitution was derived independently from remedies that were deemed purely legal or equitable, and both sets of courts fashioned their own versions of restitutionary remedies with the goal of preventing unjust enrichment.[18] Because restitution bears a passing similarity to notions of restoration, some judges and practitioners can mistakenly understand the remedy only as a means "of making plaintiff whole or restoring a previous status quo."[19] However, where preventing unjust enrichment is concerned, restitution is more naturally understood as a means to deny *defendants* the benefit of their wrong—not just compensation for an injured plaintiff.[20] Like restitution, the principles underlying disgorgement were molded in common law courts as well as courts of equity and, as a result, have been applied as both a legal *and* an equitable remedy to prevent defendants' unjust enrichment.[21] While "disgorgement" generally refers to the process of stripping ill-gotten profits from a defendant, the principles underlying the doctrine have been applied as: (1) a quasi-punitive

15. *Courts of Equity vs. Courts of Law – When Are You Entitled to a Jury Trial in Civil Lawsuits*, JD PORTER LLC, https://www.jdporterlaw.com/285-2/court-equity-vs-courts-law-entitled-jury-trial-civil-lawsuits [https://perma.cc/9NPR-8ESQ].

16. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 6 (4th ed. 2012) ("Where the law/equity distinction is especially murky, as in restitution, lawyers and judges tend to overlook it, and the distinction becomes less and less important. Where the distinction is written into substantive law, judges have trouble applying it.").

17. Roberts, *supra* note 8, at 1416; *see* Ryan, *supra* note 1, at 10–11.

18. *See* LAYCOCK, *supra* note 16, at 6; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011).

19. LAYCOCK, *supra* note 16, at 492; *see also* Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1578 (2002) ("Modern scholars have debated whether restitution should be defined solely as the law of unjust enrichment or whether it also includes 'restoration' remedies.").

20. LAYCOCK, *supra* note 16, at 492. For clarity's sake, if P invests money with D and then sues D based on a theory of *equitable* restitution, P only recovers *D's profits*—meaning that P could recover less than the value of the original investment (or, theoretically, a "windfall profit" should D unlawfully use P's investment to realize a more valuable profit). *See* IUS COMPARATUM—GLOBAL STUDIES IN COMPARATIVE LAW, DISGORGEMENT OF PROFITS 5 (Ewoud Hondius & André Janssen eds., 2015); *see also* Murphy, *supra* note 19, at 1582 ("In certain circumstances—typically those of conscious wrongdoing—the defendant may be required to disgorge any profits that it derived from the benefit, and the amount of recovery for unjust enrichment may therefore exceed the plaintiff's loss.").

21. *See* JAFFEY, *supra* note 11, at 374; IUS COMPARATUM, *supra* note 20, at 6 n.20.

measure at common law, (2) an account of profits via constructive trust[22] in the courts of equity, and (3) a penalty in modern civil proceedings.[23]

Common law courts conflating restitution with "damages" perhaps helps explain the confusion surrounding the boundaries of disgorgement.[24] Historically, the remedy for a "restitutionary action[] at law has been a money judgment," with the amount of relief being measured by the amount of money a defendant received.[25] Put another way—legal restitution was calculated to reach a figure that would make the plaintiff(s) whole. As such, legal restitution's application bore many similarities to simple judgements for compensatory damages and inveigled courts to conflate the two, eroding the formalistic separation between restitution's victim-oriented roots and other relief's deterrence-based objectives.[26] Congress has done little to help clarify this distinction, using the term inconsistently across various statutes and necessarily giving "restitution" a context-specific definition—its breadth to be determined by principles of statutory interpretation.[27] Today, courts seem to conflate the character of a judgement that includes disgorgement with goals more properly suited for one that includes monetary damages, applying disgorgement without regard to the existence of a victim-class (as underlies its restitutionary upbringing) and even opting to inflict additional deterrence-based harm to the defendant through penalties.[28] In this sense, even the most reserved application of disgorgement may form the foundation for a court judgement to take on a quasi-punitive—and necessarily inequitable—nature.

Alternatively, the restitutionary application of disgorgement in the courts of equity began with the use of a "constructive trust" and were molded through *in rem* proceedings.[29] In these circumstances, plaintiffs may forgo suing for

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22. JAFFEY, *supra* note 11, at 366, 374. Disgorgement has also been applied in ways that circumvent the need to rely on the idea of a constructive trust—for example, in intellectual property infringement claims. *See* Liu v. SEC, 140 S. Ct. 1936, 1944 (2020). However, in the context of SEC disgorgement, where a defendant has been unjustly enriched with a tangible pecuniary asset, the idea of a constructive trust may be relevant.

23. *See infra* discussion accompanying notes 33–38.

24. *See* Murphy, *supra* note 19, at 1586 ("[S]cholars write of 'restitutionary damages' and 'disgorgement damages,' with the term 'damages' seeming to have the meaning of monetary relief generally.").

25. *Id.* at 1602. Thus, this figure would be gauged without regard to the existence of a defendant's earned profits—a consideration targeted by restitution in equity. *See id.*

26. *Id.* at 1592 ("An emphasis on restoring something to the plaintiff leads to confusion about the difference between restitution and damages, because the main purpose of compensatory damages is also the 'restoration' of the plaintiff to its rightful position.").

27. *See id.* 1595–98.

28. JAFFEY, *supra* note 11, at 375. In fact, many applications of SEC disgorgement support this notion, where both disgorgement and monetary penalties are levied against defendants and usually result in a judgement that requires a defendant to pay out double their ill-gotten profit. *See, e.g.*, SEC v. Penn, No. 14-cv-581, 2021 WL 1226978, at *15 (S.D.N.Y. Mar. 31, 2021); *see also* Ryan, *supra* note 1, at 13.

29. *See* JAFFEY, *supra* note 11, at 366.

conversion of property and bring an equitable claim to have the property *itself* ejected from the constructive trustee's possession.[30] An "account of profits" similarly leaned on the notion of a constructive trust and allowed pecuniary liability be imposed on defendants who receive money from plaintiffs in a fiduciary relationship.[31] In the context of an "account of profits," the "trustee [was] liable to account to the beneficiary for the value of the trust fund."[32] Both the constructive trust and account of profits are instruments that found footing in the courts of equity and involved a defendant being forced to return—not the *value* of the asset held in constructive trust—but instead the *asset itself* where it could be identified and was within the defendant's possession.[33] In doing so, a defendant would be stripped of the benefit (or profit) they possess from the asset, disgorging the asset in a manner that prevents *the defendant's* unjust enrichment to the benefit of victims.

What happens if a remedy is not limited to the recovery of identifiable profits for victims but still labeled "disgorgement"? Well, arguably, it still may be properly labeled as a modern version of disgorgement; however, its application as an equitable remedy cannot withstand scrutiny. As the Supreme Court observed in *Liu v. SEC*, the label "disgorgement" as applied to any remedy "is a creation of the 20th century."[34] In reliance on nomenclature like "account of profits" and historic ties to equitable principles, "courts came to accept as a truism the notion that disgorgement is inherently an ancillary equitable remedy."[35] However, disgorgement necessarily becomes a legal remedy by contriving historic principles that anchor its application in the courts of equity.[36] Indeed, "[w]hen [an] order makes no pretense of requiring the actual disgorgement of anything the defendant possesses or has access to, it is neither disgorgement nor an exercise of equitable power. It is a mere personal liability to pay a money judgment—the quintessence of a remedy at law."[37] Similarly, if a court orders that a defendant disgorge the gross amount originally invested by a plaintiff *after* the defendant has incurred legitimate and lawful losses on the investment (and thus independent from any benefit derived by the defendant), the order goes beyond simply preventing unjust enrichment by requiring the defendant to "disgorge" more than their net ill-

30. *See id.* at 366, 369–70.

31. *See id. at* 365.

32. *Id.*

33. *See* Ryan, *supra* note 1, at 9–11.

34. Liu v. SEC, 140 S. Ct. 1936, 1950 (2020) (Thomas, J., dissenting); *see also* Ryan, *supra* note 1, at 10 ("The Government Accounting Office has likewise reported that '[t]he use of the disgorgement sanction in securities law violation cases is a relatively recent phenomenon,' and that '[d]isgorgement was first ordered in a securities law violation case in 1970.'" (alteration in original)).

35. Ryan, *supra* note 1, at 3.

36. *See id.* at 10.

37. *Id.*

gotten profits.[38] Although application of disgorgement in the above contexts contrives the claim that it is being administered in an equitable fashion, modern acquiescence in the result lends support to the idea that "disgorgement" is not an inherently equitable remedy and may properly be administered as a penalty itself.[39]

Thus, we are left with three common understandings of disgorgement: (1) quasi-punitive disgorgement as administered at common law, where it operates without a victim-focus and can instead provide a deterrence-based justification for additional legal punishment;[40] (2) equitable disgorgement as administered in the courts of equity, where a defendant is required to relinquish a specified asset in their possession to neutralize their net profit;[41] and (3) punitive disgorgement as applied in modern civil courts, where a defendant is ordered to pay a money judgement without regard to possession of the asset, their net personal benefit derived from the asset, or victims—constituting a penalty itself.[42]

B. The SEC's Remedial Authority

Congress established the SEC in response to the stock market crash of 1929 and to combat the surrounding public distrust of the nation's capital markets.[43] Pursuant to the Securities Exchange Act of 1934, the SEC was created and authorized to seek "injunctions barring future violations of the securities laws and refer[] cases to the Department of Justice for criminal prosecution."[44] For the first thirty years of its existence, the SEC was a relatively weak federal agency[45] until the courts and Congress began to expand its remedial authority.[46]

In 1971, the SEC was successful in attaining its first judgement for restitution in *SEC v. Texas Gulf Sulphur Co.*[47] There, defendants were charged with insider trading and other violations of the Exchange Act for issuing a company press

38. *See Liu*, 140 S. Ct. at 1950.

39. *See generally* Kokesh v. SEC, 137 S. Ct. 1635 (2017) (holding that disgorgement is a penalty where its application exceeds the profits gained by a defendant and thus is more consistent with deterrence rather than with principles of equity).

40. *See supra* notes 24–28 and accompanying text.

41. *See supra* notes 29–33 and accompanying text.

42. *See supra* notes 34–39 and accompanying text.

43. SUSAN M. PHILLIPS & J. RICHARD ZECHER, THE SEC AND THE PUBLIC INTEREST 5, 8 (1981).

44. Jennifer J. Schulp, Liu v. SEC*: Limiting Disgorgement, but by How Much?*, CATO SUP. CT. REV. 203, 205 (2020).

45. PHILLIPS & ZECHER, *supra* note 43, at 13 ("[T]he SEC itself became known as [a] toothless tiger and a training ground for Wall Street securities lawyers.").

46. Schulp, *supra* note 44, at 205 ("By the 1960s, the commission began advancing more expansive interpretations of the securities laws, including developing a substantial insider-trading doctrine. The SEC also broadened its remedial power by appealing to the inherent equitable authority of courts to order ancillary relief." (footnote omitted)).

47. SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971).

release containing misleading statements.[48] The Second Circuit upheld an injunction in favor of the SEC against two individual defendants and went on to affirm the Commission's request for restitution of profits.[49] The Second Circuit bolstered its decision on the notion that district courts have inherent equitable powers and may grant such relief where appropriate.[50] In response to defendants' contention that the SEC lacked authority to seek any remedy but an injunction, the court indicated that it did not read Congress's explicit authorization for the SEC to seek injunctions as a restriction to pursue other remedies that fall within the courts' power to administer.[51] Following the decision in *Texas Gulf Sulphur Co.*, the SEC began to regularly seek and be awarded disgorgement in its civil enforcement proceedings,[52] and the judiciary's willingness to uphold these judgements began to insulate the notion that disgorgement must necessarily be an equitable remedy.[53]

In 1990, the SEC was given another remedial tool by Congress: the ability "to seek monetary penalties against securities law violators."[54] For all violations outside of insider trading, these penalties are administered in three tiers of severity and penalize a defendant by forcing them to either pay (1) a set statutory amount per violation[55] or (2) a sum of money equal to the "gross amount of pecuniary gain."[56] The ability to seek money penalties greatly increased the SEC's authority to recover illicit financial gains[57] and has resulted in severe judgements against defendants by coupling the deterrence-based monetary penalties with disgorgement.[58] In 2002, the Sarbanes-Oxley Act explicitly gave the SEC authority to seek "any equitable relief that may be appropriate or necessary for the benefit of investors."[59] With affirmative Congressional authorization to seek equitable remedies in place, the SEC no longer needed to appeal to district courts' inherent authority to apply equitable remedies and could "cite [the Sarbanes-Oxley Act] as statutory authority for ordering disgorgement."[60]

48. *Id.* at 1304.
49. *Id.* at 1306–08.
50. *Id.* at 1307–08.
51. *Id.* at 1307.
52. *See* Ryan, *supra* note 1, at 3 n.13.
53. *Id.* at 3.
54. *Id.* (discussing the Securities Enforcement Remedies and Penny Stock Reform Act).
55. *See* SEC v. Fowler, 6 F.4th 255, 264 (2d Cir. 2021).
56. 15 U.S.C. § 78u(d)(3)(B) (2018).
57. *See* Ryan, *supra* note 1, at 3.
58. *See, e.g.*, *Fowler*, 6 F.4th at 264–67. For an explanation on the necessary, deterrence-based pairing of disgorgement and civil penalties in modern SEC civil proceedings, see *infra* Section IV.A.
59. *See* § 78u(d)(5).
60. *See* Ryan, *supra* note 1, at 4.

In 2017, the modern acceptance of disgorgement as an "inherently equitable remedy"[61] came under fire in *Kokesh v. SEC.*[62] In *Kokesh*, the SEC brought suit against a defendant for allegedly misappropriating $34.9 million in connection with offering investment advice through various business entities.[63] The defendant argued that the SEC's application of disgorgement was not a form of equitable relief—but instead, a penalty and thus subject to a five-year statute of limitations under 28 U.S.C. § 2462.[64] The Supreme Court agreed and went on to hold that the SEC's use of disgorgement is more punitive than equitable where it: (1) is imposed as a deterrent for violations of public law; (2) often leaves the defendant in a worse-off position by disgorging the full amount taken from investors (with no deductions for business-expenses); and (3) is not directly compensatory (where the SEC does not transfer the disgorged funds from the fraudster back to harmed investors).[65] In a footnote, the Court seemed to squarely challenge the SEC's ability to be awarded disgorgement at all, stating: "Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context."[66]

In 2020, the Court was able to address the footnote raised in *Kokesh* head-on in *Liu v. SEC.*[67] There, defendants argued that the SEC had no right to seek disgorgement at all because, outside of monetary penalties,[68] the SEC only had statutory authorization to seek injunctions and equitable relief.[69] Thus, under *Kokesh*, the defendants argued that SEC disgorgement was necessarily a penalty and incompatible with the Commission's statutorily authorized remedies.[70] The Court clarified that the SEC had been relying on *a version* of disgorgement that constituted a penalty, but affirmed that the remedy can be applied in a manner consistent with traditional notions of equitable relief.[71] As such, the Court held that the SEC may continue seeking disgorgement as equitable relief[72]—but sought to reign in the agency's power

61. *Id.* at 5.

62. Kokesh v. SEC, 137 S. Ct. 1635, 1637–38 (2017).

63. *Id.* at 1641.

64. *Id.* at 1643–45; *see also* 28 U.S.C. § 2462 ("Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, 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.").

65. *Kokesh*, 137 S. Ct. at 1643–45.

66. *Id.* at 1642 n.3.

67. Liu v. SEC, 140 S. Ct. 1936, 1937–39 (2020).

68. *See* 15 U.S.C. § 78u(d)(3).

69. *Liu*, 140 S. Ct. at 1940, 1946.

70. *Id.* at 1946.

71. *See id.* at 1946–47.

72. *Id.* at 1940.

in applying the remedy.[73] To be applied as equitable relief, the Court held that: (1) The amount disgorged should be distributed back to investors (leaving open the question of whether depositing the proceeds with the Government through the U.S. Treasury can be "for the benefit of investors"[74]); (2) disgorgement can only be applied to multiple defendants to hold them jointly and severally liable where they played equally culpable roles in the fraud; and (3) the amount disgorged cannot exceed the defendant's net profits.[75]

C. The NDAA's Disgorgement Provision

After the *Kokesh* decision in 2017, SEC officials grew weary of its implications.[76] Specifically, officials were concerned that much of the funds they had previously been able to target with disgorgement were now time-barred based on the statute of limitations for penalties under § 2462—and that the Supreme Court explicitly called into question the Commission's authority to seek disgorgement at all.[77] In 2019, "while the *Liu* case was still pending in the lower courts," legislators began to put forth bills to address both these concerns.[78] The three bills that were introduced all expressly authorized the SEC to seek disgorgement in civil enforcement proceedings[79] and set forth various statutes of limitations to be applied to the remedy.[80] Yet, none of the three bills cleared both the House and Senate, and it did not appear that the 116th Congress would be able to remedy the uncertainty brought on by *Kokesh*[81]—until "legislation closely resembling the stalled Senate disgorgement bill resurfaced in . . . [the 2021] 1,480-page National Defense Authorization Act (NDAA), just days before the bill overwhelmingly passed both houses of Congress."[82]

The Senate was the first to introduce legislation relevant to the SEC's power to seek disgorgement[83] and submitted another bill to Congress later that year with nearly identical language.[84] The Senate proposals expressly gave

73. *See id.* at 1947–50.

74. *Id.* at 1948–49 (internal quotation marks omitted).

75. *Id.* at 1947–50.

76. Russ Ryan et al., *Unpacking the SEC's New Disgorgement Powers*, 22 J. Inv. Compliance 180, 181 (2021); *see Testimony on "Oversight of the Securities and Exchange Commissions": Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 116th Cong. (2020) (statement of Jay Clayton, Chairman, Sec. & Exch. Comm'n).

77. Ryan et al., *supra* note 76, at 181.

78. *Id.*; *see* Securities Fraud Enforcement and Investor Compensation Act of 2019, S. 799, 116th Cong. § 2 (2019); *see also* Investor Protection and Capital Markets Fairness Act, H.R. 4344, 116th Cong. § 2 (2019); Illicit Cash Act, S. 2563, 116th Cong. § 502 (2019).

79. *See, e.g.*, H.R. 4344 § 2.

80. *See* Ryan et al., *supra* note 76, at 181–82.

81. *Id.*

82. *Id.* at 182.

83. *See* S. 799 § 2.

84. *See* Illicit Cash Act, S. 2563, 116th Cong. § 502 (2019).

the SEC authority to seek "disgorgement . . . by the person who received any unjust enrichment as a result of such violation."[85] Despite authorizing "disgorgement," the Senate did not define the term in either bill but did mandate that the amount collected "shall be offset by any amount of restitution that the person is ordered to pay."[86] Lastly, the Senate proposals sought to codify a five-year statute of limitations for disgorgement, with a longer limitation being allotted for both equitable remedies and restitution.[87] Notably, the Senate proposals allowed the statute of limitations to begin running from the last date of unjust enrichment[88]—not, as *Kokesh* held, when the SEC's cause of action first accrued.[89]

The House put forth its own proposal to codify the SEC's authority to seek disgorgement.[90] The Investor Protection and Capital Markets Fairness Act would give the SEC authority to seek "[d]isgorgement in the amount of any unjust enrichment obtained as a result of the act or practice with respect to which the Commission is bringing such an action or proceeding."[91] Again, the bill did not expressly define "disgorgement"; however, it did include a construction provision that forbid the courts from construing disgorgement as a penalty.[92] Lastly, the bill sought to establish a statute of limitations period for disgorgement of fourteen years.[93] Like its Senate counterparts, the statutory period would not begin to run until "after the alleged violation."[94]

On January 1, 2021, Congress overrode President Donald Trump's veto and passed The NDAA into law.[95] The overarching purpose of The NDAA was to lay the basis for 2021 military spending, and, as a result, legislative history addressing the sudden addition of section 6501, the SEC disgorgement provision, is scant.[96] Buried in the 1,480 page military spending bill, section 6501 borrows language from the previous Congressional attempts to pass SEC

85. S. 799 § 2(a)(1)(B)(ii).

86. *Id.* § 2(a)(3) (proposing that new language be added to § 78u(d) to authorize the SEC to seek disgorgement and restitution).

87. *See id.* (proposing statute of limitations periods and including a *ten*-year period for equitable relief and restitution); *see also* S. 2563 § 502(a)(3) (proposing statute of limitations periods and including a *twelve*-year period for equitable relief and restitution).

88. *See* S. 799 § 2(a)(3); S. 2563 § 502(a)(3).

89. Ryan et al., *supra* note 76, at 186.

90. Investor Protection and Capital Markets Fairness Act, H.R. 4344, 116th Cong. § 2 (2019).

91. *Id.* § 2(a) (proposing new amendments be added to § 78u(d) to codify SEC disgorgement).

92. *See id.*

93. *Id.*

94. *See id.*

95. Ike Adams, Chris Mills & David Petron, *SEC Disgorgement Authority May Be Limited Even After Recent Amendments to the Exchange Act*, ABA: BUS. L. TODAY (Jan. 27, 2021), https://www.sidley.com/-/media/publications/aba_business-law-today_jan2021 6.pdf?la=en [https://perma.cc/3CA8-AATU].

96. Ryan et al., *supra* note 76, at 182 ("We have found only a single sentence in the Congressional Record that even vaguely alluded to these provisions before the final vote, suggesting that many legislators may have been completely unaware of their last-minute insertion into the otherwise unrelated defense spending bill." (footnote omitted)).

disgorgement authority into law[97] and seems to lean more heavily in favor of the Senate's proposals.[98] Now codified under 15 U.S.C. § 78u(d), The NDAA, without defining the disgorgement,[99] authorized the SEC to disgorge "any unjust enrichment by the person who received such unjust enrichment as a result of such violation."[100] For violations of a few enunciated provisions of the securities laws[101] and "any other provision . . . for which scienter must be established[,]" The NDAA set the statute of limitations for disgorgement at ten years[102] and, for all other violations (lacking scienter), at five years.[103] The NDAA also adopted the Senate's proposal[104] for a ten year statute of limitations for equitable or injunctive relief, but without any mention of restitution.[105] Borrowing from both arms of Congress, The NDAA's provisions governing statutes of limitations would not begin to run until the last violation of the securities laws,[106] and the now-revised version of § 78u(d) would "apply . . . to any action or proceeding that is pending on, or commenced on or after, the date of enactment of this Act."[107]

II. Modern Issues Facing SEC Disgorgement

Even before The NDAA passed into law, *Liu*'s holding casted doubt on the SEC's ability to efficiently seek disgorgement in discreet classes of securities law violations. Indeed, under the Court's three-prong test, application of the remedy would be most frustrated where injured investors are difficult to identify. The NDAA's disgorgement provision was passed to preserve the SEC's ability to continue seeking the remedy—but did little to explain whether the remedy will enjoy pre-*Liu* flexibility or will be constrained by *Liu* as the SEC faces future challenges. Section III.A. discusses the uncertainties left in the wake of *Liu* and Section III.B. highlights the shortcomings of The NDAA.

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97. *Compare* The NDAA § 6501(a), *with* Securities Fraud Enforcement and Investor Compensation Act of 2019, S. 799, 116th Cong. § 2 (2019), *and* H.R. 4344, § 2, *and* Illicit Cash Act, S. 2563, 116th Cong. § 502 (2019).

98. Ryan et al., *supra* note 76, at 182 ("[L]egislation closely resembling the stalled Senate disgorgement bill resurfaced in . . . this year's 1,480-page National Defense Authorization Act (NDAA)[.]").

99. *See* The NDAA § 6501(a)(3); 15 U.S.C. § 78u(d)(7) (2020).

100. *See* The NDAA, § 6501(a)(3); § 78u(d)(3)(A)(ii).

101. These include Section 10(b) of the Exchange Act, Section 17(a)(1) of the Securities Act of 1933, and Section 206(1) of the Investment Advisers Act of 1940. S*ee* § 78u(d)(8)(A)(ii).

102. *See* The NDAA § 6501(a)(3); § 78u(d)(8)(A)(ii).

103. *See* The NDAA § 6501(a)(3); § 78u(d)(8)(A)(i).

104. *See* Securities Fraud Enforcement and Investor Compensation Act of 2019, S. 799, 116th Cong. § 2(a)(3) (2019).

105. *See* The NDAA § 6501(a)(3); § 78u(d)(8)(B).

106. Ryan et al., *supra* note 76, at 186.

107. The NDAA § 6501(b).

A. *Problems in* Liu *of The NDAA*

Since its acceptance by the judiciary as an authorized remedy through the present day, disgorgement has proven to be the SEC's most effective tool in recovering monetary judgements from defendants.[108] Although *Liu* was an offering fraud case,[109] the breadth of the Supreme Court's holding implicated the SEC's authority to seek disgorgement across a variety of securities law violations.[110] The Court's requirement that SEC disgorgement must adhere to historic equitable principles has raised new hurdles in obtaining profits-based money judgements from market-harming violations that do not present a readily ascertainable class of victims.[111] Perhaps most troubling is the survival of *Kokesh* after *Liu*, beckoning the question of whether the Court has tacitly acquiesced to the idea of two different versions of disgorgement.[112]

1. Market-Harming Violations

Violations that harm the broader securities markets envelop situations where a group of injured investors is difficult or impossible to ascertain. Although the *Liu* Court technically left open the question of whether distributing disgorged funds to the Government through the U.S. Treasury is acceptable "where it is infeasible to distribute the collected funds to investors,"[113] commentators agree that the SEC must do more than simply substitute investor repayment for Treasury allocation.[114] In fact, the Court seemed to lean against the notion, calling into question whether distribution "feasibility is relevant at all to equitable principles."[115] The inability to pinpoint a subset of injured investors frustrates *Liu*'s general requirement that "the SEC . . . return a defendant's gains to wronged investors for their benefit,"[116] and

108. *See* Schulp, *supra* note 44, at 203; 2020 ENFORCEMENT REPORT, *supra* note 3, at 17; David Levintow, *Down, but Not Out: After* Liu*, Disgorgement Challenges for the SEC in FCPA Enforcement*, 28 PIABA BAR J. 179, 181 (2021) ("Disgorgement, the equitable remedy upheld (with caveats) by the Court, is the principal sanction imposed by the SEC on alleged wrongdoers.").

109. *Internet Fraud*, U.S. SEC. & EXCH. COMM'N (June 25, 2013), https://www.sec.gov/fast-answers/answersinternethtm.html [https://perma.cc/NPP7-X8UW] ("Generally speaking, an offering fraud involves a security of some sort that is offered to the public, where the terms of the offer are materially misrepresented."). In the context of a small-cap offering fraud, as exemplified in *Liu*, the Court's limitations on disgorgement are more feasible. The universe of harmed investors is confined to those who invested in a singular, small company solely on the basis of false/misleading statements by an issuer, and disgorged funds may be returned to victims on a *pro rata* basis. *See, e.g.*, SEC v. Rinfret, No. 19-cv-6037, 2020 WL 6559411, at *6 (S.D.N.Y. Nov. 9, 2020).

110. *See generally* Schulp, *supra* note 44 (applying open questions left by *Liu* to other securities law violations where disgorgement has been sought). *See* 2020 ENFORCEMENT REPORT, *supra* note 3, at 7.

111. *See, e.g.*, Levintow, *supra* note 108, at 201–04, 210–12.

112. *See* Schulp, *supra* note 44, at 223–24.

113. Liu v. SEC, 140 S. Ct. 1936, 1948 (2020).

114. *See, e.g.*, Schulp, *supra* note 44, at 220.

115. *Liu*, 140 S. Ct. at 1948 n.5

116. *Id.* at 1948.

violations of the securities laws involving insider trading, market manipulation, and the Foreign Corrupt Practices Act are exemplary of these difficulties.[117]

i. Insider Trading

Dating back to *Texas Gulf Sulphur*, the SEC has regularly sought disgorgement-based remedies as equitable relief in insider trading cases.[118] Insider trading is commonly understood as the buying or selling of a security "on the basis of material, nonpublic information about the security."[119] Under the insider trading umbrella, there exists (1) "classical" insider trading—involving a company *insider* that trades securities based on material nonpublic company information or gives a tippee such information to trade upon, and (2) "misappropriation" insider trading—involving a company *outsider* uncovering material nonpublic information and trading on that information or enabling others to do so.[120] Although the SEC regularly sought disgorgement in insider trading cases pre-*Liu*, commentators have criticized the judiciary's willingness to "disgorge" tippee profits from tippers[121] and courts have wrestled with the practical flaws associated with identifying victims and distributing disgorged funds.[122]

The SEC's application of disgorgement as an equitable remedy in insider trading cases has long been flawed.[123] In the seminal *Texas Gulf Sulpher* case, the Second Circuit upheld the first SEC request for a disgorgement-based remedy in order to deprive insider trading defendants "of the gains of their wrongful conduct."[124] In contravention of historic equitable considerations, the court required that a tipper-defendant be held liable for profits realized by his *tippees*, notwithstanding the fact that he did not have a claim to—nor

117. Notably, these types of violations do not require a fiduciary relationship be established between the injured party and wrongdoer, seemingly contriving the historic application of an account of profits on its face. *See* discussion *supra* Section II.A. However, profits-based equitable remedies have been allowed to proceed in patent infringement cases absent such a relationship and bolster the idea that a fiduciary relationship is not a prerequisite to disgorgement. *See Liu*, 140 S. Ct. at 1944.

118. Verity Winship, *Disgorgement in Insider Trading Cases: FY2005-FY2015*, 71 SMU L. REV. 999, 1000–02 (2018).

119. *Insider Trading*, U.S. SEC. & EXCH. COMM'N, https://www.investor.gov/introduction-investing/investing-basics/glossary/insider-trading [https://perma.cc/B843-ELQZ].

120. *See* Schulp, *supra* note 44, at 221; *see also* John K. Robinson, Note, *A Reconsideration of the Disgorgement Remedy in Tipper-Tippee Insider Trading Cases*, 62 GEO. WASH. L. REV. 432, 432–34, 434 n.9 (1994) (discussing disgorgement's shortcomings in tipper-tippee insider trading cases).

121. *See* Robinson, *supra* note 120, at 432–34.

122. *See* Paul Gonson & Randall W. Quinn, *The Disgorgement Dilemma: Who Gets the Money Covered by the SEC in Insider Trading Cases?*, 35 FED. BAR NEWS & J. 192, 193–95 (1988).

123. *See* Robinson, *supra* note 120, at 447 ("[T]he traditional disgorgement remedy was not wholly suited to the insider trading cases to which it was applied, resulting in what most accurately is defined as a distant relative of traditional disgorgement.").

124. SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971).

even possession of—these profits.[125] In the court's view, prompting the tipper to "disgorge" a sum of money independent from any ill-gotten profits he realized was justified to preserve company insiders' "duty to refrain from trading on the basis of inside information."[126] Reading between the lines of *Texas Gulf Sulpher*'s deterrence-based reasoning, perhaps the court's pained stretching of equitable principles can be appreciated as a product of its era. Indeed, at the time of the opinion, Congress had yet to grant the SEC authority to seek civil penalties and tippee-based liability theories were not sufficiently developed.[127] Troublingly however, the practice of holding tippers liable for their tippees' profits continued even after the advent of Congressionally authorized penalties and the refinement of tippee-based liability theories.[128]

In addition, both the courts and the SEC have historically struggled to identify a class of harmed investors to whom they should disgorge the funds to in a manner consistent with equitable relief—the first question being who even fits the description of "injured."

> [I]n classic 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 . . . 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.[129]

In fact, the two subsets of insider trading—classical and misappropriation—have been held to encompass varying levels of liability-exposure to investors in private lawsuits, where investors may be able to state a claim against company *insiders* who engage in classical insider trading, but are unable to state a claim against other traders under a misappropriation theory on similar facts.[130] Although such a rule may seem sensible from a fiduciary duty standpoint, implicit in the result is the recognition of one class of shareholders

125. *Id.* (noting that applying disgorgement's principles in this context is "more of a hardship").

126. *Id.*

127. *See* Robinson, *supra* note 120, at 433.

128. *See id.* at 447–52; *see, e.g.*, SEC v. Clark, 915 F.2d 439, 454 (9th Cir. 1990); SEC v. Warde, 151 F.3d 42, 49 (2d Cir. 1998); SEC v. Contorinis, 743 F.3d 296, 302–04 (2d Cir. 2014).

129. Ryan et al., *supra* note 76, at 185. Given the general acceptance that the proper "victim" in misappropriation-based insider trading schemes is the company that had its information misappropriated, it is troubling that the SEC has been successful in seeking disgorgement in these cases where they do not "return" the disgorged funds to the company. *See, e.g.*, SEC v. Sabrdaran, 252 F.Supp. 3d 866 (N.D. Cal. 2017); Final Judgment Against Defendants Sasan Sabrdaran and Farhang Afsarpour at 2, SEC v. Sabrdaran, No. 14-cv-4825 (N.D. Cal. June 15, 2017). The docket in *Sabrdaran* does not reflect a court-submitted proposal for distribution as contemplated in the Final Judgement.

130. *See* Moss v. Morgan Stanley Inc., 719 F.2d 5, 16 (2d Cir. 1983).

as "injured" and the rejection of the other's claim—despite the fact that the effect to shareholder equity would be virtually the same under either theory.[131]

Even assuming that company investors are always entitled to disgorged funds under either theory, identifying the "injured" shareholders remains a problem. Intuitively, shareholders who trade directly with an individual in possession of material nonpublic information seem likely to qualify as the injured investors to whom disgorged profits should be given to; however, such an allocation would result in a windfall to any investor(s) who simply sought to execute a trade without regard to whom the trade was with or knowledge of nonpublic information.[132] The notion of limiting disgorged funds to this group of investors is especially problematic in the event the bad actor's trade is of such magnitude that it "moves the market," wrongfully effecting the pricing of downstream trading until the inside information becomes public.[133] To address these concerns, courts have engaged in discretionary line-drawing exercises, specifying windows of time for investors to have traded[134] in order to qualify as a victim and be eligible for disgorged funds.[135] Even after clearing the aforementioned hurdles, there are still questions regarding whether the injured investors shall collect on an equal basis or a *pro rata* basis[136] and how the SEC can verify a claimant's entitlement to the disgorged funds.[137]

With the modern existence of tippee liability theories and through the judiciary's willingness to painstakingly recognize a limited class of "injured" investors, the impracticality of seeking disgorgement in insider trading cases

131. *See* Gonson & Quinn, *supra* note 122, at 193–94 (citing *Moss* and noting that the SEC takes the position that the outcome in *Moss* was wrong). Of course, there may be a more drastic and long-term impact to shareholder value if, for example, a high-ranking company officer engages in insider trading. However, such a consideration is only relevant to the long-term implications after the conduct is discovered—not to the issue of whether and which investors were harmed by the act of insider trading itself.

132. *See id.* at 194 ("There seems to be no good reason why [an investor] should be the only one to recover while someone who, equally unaware of the material information possessed by the inside trader, sold two minutes earlier or later gets nothing.").

133. *See id.* at 195 (noting that trading activity can affect market movements).

134. Often allowing windows to capture times both before and after the trades at issue take place. *See id.*

135. *Id.*

136. *See id.* (noting that the SEC favors equal distribution among qualifying claimants, advocating that such an approach is consistent with equitable principles); STENGER & STENGER, DISTRIBUTION OF DISGORGEMENT FUNDS TO INVESTORS § 7.02 (2015), https://www.stengerlaw.com/book/distribution-of-disgorgement-funds-to-investors [https://perma.cc/2SB2-L2KP].

137. For an example of the many parties who assert a claim to disgorged funds and the difficulty of striking a proper balance when many parties may assert they were indirectly injured through insider trading, see SEC v. Levine, 881 F.2d 1165, 1171–74 (2d Cir. 1989); see also *Information for Harmed Investors*, U.S. SEC. & EXCH. COMM'N (May 18, 2022), https://www.sec.gov/enforce/information-for-harmed-investors [https://perma.cc/5SDW-U46B] (detailing the many parties implicated in a claims process, including third-party fund administrators, broker-dealers, and investors themselves).

is more apparent than ever.[138] This proposition rang clear post-*Liu* and seemed to be acknowledged by the SEC in *SEC v. Govender*.[139] There, a non-insider tipper received material nonpublic information from an insider executive and proceeded to sell that information to a non-insider tippee for $222,788.[140] The SEC sought to disgorge this amount and impose a civil penalty on the tipper of $668,364[141]—a three-time multiple of the tipper's gross pecuniary gain.[142] *Liu* was decided during the litigation's pendency and "[t]he SEC [subsequently] withdrew its request for disgorgement . . . seek[ing] only the civil penalty amount."[143] After considering the sought-after civil penalty, the court held the tipper liable for a $445,576—two-times the amount of gross pecuniary gain.[144]

Even though the SEC has historically been successful in advocating for checkered liability theories and non-causal, temporal standards of harm in insider trading cases, disgorgement's post-*Liu* death would not significantly impact the agency's remedial power. Unlike other securities law violations that require civil penalties be (1) capped at a statutorily calculated amount or (2) equal to the gross amount of a defendant's pecuniary gain,[145] insider trading civil penalties may be ordered up to an amount of "three times the profit gained or loss avoided as a result of such unlawful purchase, sale, or communication."[146] Thus, even in the absence of disgorgement, the SEC has express authority to seek financial penalties that deprive defendants of their profits *and* exact a deterrence-based punishment equal to two-times the defendant's profit.[147] This scheme of liability extends to tippers and tippees alike,[148] avoiding the need to reshape the contours of equitable relief and fit disgorgement's square peg into insider trading's round hole. In addition, a

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138. *But see* Complaint at 1–3, SEC v. Trovias, No. 21-cv-05925 (S.D.N.Y. July 9, 2021) (seeking disgorgement in an insider trading case post-*Liu*).

139. SEC v. Govender, No. 18-cv-7685, 2020 WL 5758997, at *2 (S.D.N.Y. Sept. 28, 2020).

140. *Id.* at *1.

141. *Id.* at *2.

142. *See* 15 U.S.C. § 78u-1(a)(2) (allowing the SEC to seek insider trading civil penalties in an amount "not [to] exceed three times the profit gained or loss avoided").

143. *Govender*, 2020 WL 5758997, at *2.

144. *Id.* at *2–4. Notably, this calculation mirrors the judgements for violations in which the SEC *is encouraged* to seek disgorgement. *See supra* note 28; *see also* Dixie L. Johnson, Carmen J. Lawrence & Jamie Stinson, *The Evolution and 2020 Status of Cooperation in SEC Enforcement Investigations*, 75 BUS. LAW. 2427, 2461 (2020) ("[P]enalties in FCPA matters 'often are set at an amount equal to the disgorgement amount[.]'" (alteration in original) (quoting Andrew Ceresney, Dir. of Div. of Enf't, U.S. Sec. & Exch. Comm'n, Remarks at University of Texas School of Law's Government Enforcement Institute in Dallas, Texas: The SEC's Cooperation Program: Reflections on Five Years of Experience (May 13, 2015), https://www.sec.gov/news/speech/sec-cooperation-program.html [https://perma.cc/PH2H-PEAZ])).

145. *See* § 78u(d)(3)(B).

146. § 78u-1(a)(2).

147. *See id.*

148. *See id.* § 78u-1(a)(1).

money judgement in the form of a civil penalty instead of disgorgement poses no bar to victim distribution.[149] While such an initiative seems unduly burdensome anyway,[150] the option remains open to the SEC upon recognizing an eligible class of victims.[151]

ii. Market Manipulation

Market manipulation occurs when a trader uses "facially legitimate trading methods in order to camouflage non-bona fide trades" to induce others into buying or selling a security,[152] utilizing practices such as "spoofing"[153] or "microcap fraud."[154] Market manipulation harms the stock market as a whole, making it nearly impossible to identify victims to return disgorged funds to and comply with *Liu.*[155] Manipulative trading is commonly attributed to high-frequency traders that prey upon a variety of securities, affecting a multitude of investors and companies across the stock market.[156] By taking advantage of short-term pricing fluctuations, these bad actors are able to go undetected, inhibiting the SEC's ability to retroactively tether and quantify disgorged funds to investors who have no relationship with the wrongdoer or knowledge of the wrongdoing.[157] Indeed, absent the relevant parties' complicity in identifying investors who traded on the pricing fluctuation and a time-consuming effort by SEC forensic accountants to ration the ill-gotten profits, seeking disgorgement in these contexts is simply infeasible after *Liu.*[158] Further,

149. *See* § 7246(a).

150. *See supra* text accompanying notes 123–44.

151. *See* § 7246(a).

152. *See* Joseph Zabel, *Rethinking Open- and Cross-Market Manipulation Enforcement*, 15 VA. L. & BUS. REV. 417, 417 (2021) (providing an overview of different manipulative trading tactics).

153. For example, "spoofing" involves Trader A placing a buy order to purchase Company X's stock at a value below the current market price. In order to execute such a trade, Trader A, already possessing a significant amount of Company X stock, intentionally drives down the market value of the shares by placing a sizeable amount of sell orders. When faced with an apparent and imminent increase in supply of Company X stock on the open market, "[m]arket participants will lower the price at which they are willing to sell their shares of Company X to reflect the new market price," at which point Trader A's initial buy order shall execute, and they may cancel the sell order, prompting the market price to bounce back to reflect the security's original value. *See id.* at 439.

154. Microcap fraud is another form of market manipulation, where the low-priced stock of very small companies trades off of national securities exchanges and is more susceptible to inaccurate pricing through the spread of false information by ill-intentioned investors. Microcap Fraud, U.S. Sec. & Exch. Comm'n, https://www.investor.gov/additional-resources/spotlight/microcap-fraud [https://perma.cc/476D-E22E]; *see also* Zabel, *supra* note 152, at 430–31 (describing schemes traditionally reliant on microcap frauds, such as "pump and dump" and "short and distort" schemes).

155. *See* Zabel, *supra* note 152, at 427.

156. *See id.* at 420–21, 420 n.9, 427.

157. *See id.* at 426–27.

158. In fact, a windfall to the subset of harmed investors may occur if the manipulator's trading profits were allocated to the investors with whom he traded. This Note examines such a

even if the SEC plausibly argues that they could identify a relevant investor base and allocate the disgorged funds, the issue remains that "market manipulation, by effecting actual price movement. . . . in multiple assets, can impact every market participant"—not just holders of the manipulated securities.[159]

Despite its pre-*Liu* practice of seeking disgorgement in the above contexts, the SEC seems to have acknowledged that disgorgement is a difficult remedy to apply to market manipulators.[160] In *SEC v. Lek Sec. Corp.*, the SEC litigated a pre-*Liu* market manipulation violation against Avalon, a high frequency trading firm, and two controlling defendants.[161] The defendants were alleged to have engaged in spoofing[162] for fifty-four months and cross-market manipulation for thirty-eight months,[163] bringing in approximately $28 million in revenue—$4,495,564 of which was distributed to the defendants.[164] The SEC sought and was granted disgorgement of the latter amount and moved for a third-tier civil penalty of $13.8 million to be administered against each defendant.[165] After considering its broad discretion over civil penalties, the court held that a $5 million penalty against each defendant was appropriate and reserved the right to raise the amount to $7.5 million "[i]n the event that no order of disgorgement may be enforced."[166] During the subsequent appeal, *Liu* was decided, and the matter was remanded to the district court to reconsider its holding.[167] Upon the SEC's concession that "disgorgement in this particular case would present significant practical obstacles,"[168] the agency

phenomenon in the context of insider trading and may warrant concern when applied to select market manipulation cases. *See supra* text accompanying notes 132–33.

159. Zabel, *supra* note 152, at 427.

160. *But see* Complaint at 1–2, SEC v. Melnick, No. 21-cv-04054 (N.D. Ga. Sept. 30, 2021); Complaint at 1–3, SEC v. Gallagher, No. 21-cv-08739 (S.D.N.Y. Oct. 26, 2021); Complaint at 1–3, SEC v. Muller, No. 21-cv-06048 (S.D.N.Y. July 14, 2021). While this Note does not purport to examine the intricacies of SEC administrative proceedings, it is noteworthy that the agency has steadfastly continued seeking disgorgement after *Liu* when it proceeds in-house. *See, e.g.*, Press Release, Sec. & Exch. Comm'n, J.P. Morgan Securities Admits to Manipulative Trading in U.S. Treasuries (Sept. 29, 2020), https://www.sec.gov/news/press-release/2020-233 [https://perma.cc/7NDQ-F3U6].

161. SEC v. Lek Sec. Corp., No. 17-cv-1789, 2020 WL 1316911, at *1 (S.D.N.Y. Mar. 20, 2020).

162. Also known as "layering." *See id.* at *2.

163. *Id.* at *7. "Cross market manipulation" is the buying/selling of stock to impact the pricing of corresponding options. For further explanation, see *id.* at *2 and Zabel, *supra* note 152, at 452–60.

164. *Lek Sec. Corp.*, 2020 WL 1316911, at *2, *4.

165. *Id.* at *3–6. Treating each month that the defendants engaged in the respective manipulative tactics as one "violation" under 15 U.S.C. § 78u(d)(3)(B)(iii) (2018), the SEC arrived at a civil penalty of $13.8 million by multiplying a statutory amount of $150,000 by 92 months. *See id.* at *7.

166. *Id.* at *9–10, *10 n.13.

167. SEC v. Lek Sec. Corp., No. 17-cv-1789, 2021 WL 751395, at *1 (S.D.N.Y. Feb. 9, 2021).

168. Plaintiff SEC's Reply Regarding the Impact of *Liu v. SEC* on the Final Judgment at 2, SEC v. Lek Sec. Corp., No. 17-cv-1789, 2021 WL 751395 (S.D.N.Y. Feb. 9, 2021), ECF No. 592.

acknowledged that the remedy would not be enforceable under *Liu* and accepted the court's imposition of a $7.5 million civil penalty in lieu of disgorgement.[169]

In the context of market manipulation, seeking disgorgement is rendered impractical where violative conduct touches so many parties. However, the uptick in these cases is that the SEC will often have footing to argue for exorbitant civil monetary penalties. Title 15 U.S.C. § 78u(d)(3)(B) allows for the SEC to impose a civil penalty at the greater of (1) a set statutory amount "for each violation" or (2) an amount equal to "the gross amount of pecuniary gain to such defendant."[170] Courts have construed "each violation" in a light favorable to the SEC, allowing every individual trade to count as a separate violation and thus compounding the civil penalty calculation.[171] Where manipulative trading practices often entail multiple transactions over a period of time, the SEC can achieve compounded monetary penalties based on a high volume of transactions—going beyond a defendant's gross pecuniary gain and thus serving as a deterrent.[172] However, such a result is necessarily predicated on the existence of a sufficient number of transactions, risking the SEC's ability to adequately deter low-volume trading violations.[173]

iii. Foreign Corrupt Practices Act

Violations of the Foreign Corrupt Practices Act ("FCPA") generally consist of bribing "foreign officials to assist in obtaining or retaining business" or failing to maintain accurate accounting records to provide assurance that assets are

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169. *Lek Sec. Corp.*, 2021 WL 751395, at *1.

170. § 78u(d)(3)(B).

171. *See, e.g.*, SEC v. Pentagon Cap. Mgmt. PLC, 725 F.3d 279, 288 n.7 (2d Cir. 2013); SEC v. Dang, No. 20-cv-01353, 2021 WL 1550593, at *8 (D. Conn. Apr. 19, 2021); *see also Lek Sec. Corp.*, WL 1316911, at *9 (describing counting each series of trades within a month as one violation as reasonable); SEC v. Kenton Cap., Ltd., 69 F.Supp. 2d 1, 17 n.15 (D.D.C. 1998) (calculating the number of violations by each injured investor); SEC v. Rinfret, No. 19-cv-6037, 2020 WL 6559411, at *8 (S.D.N.Y. Nov. 9, 2020) (noting that courts have calculated the number of violations based on each violated statute or treating multiple unlawful acts as part of one scheme).

172. *Cf. Lek Sec. Corp.*, 2020 WL 1316911, at *9 (acknowledging that the SEC's identification of ninety-two violations to reach a $13.8 million civil penalty was properly calculated against a disgorgement order of approximately $5 million, representing *the collective defendants'* gross pecuniary gain).

173. Suppose Investor A participates in a "pump and dump" microcap fraud, selling her stock in Company Z at a premium and realizing a profit in excess of $100,000 after her colleague, Investor B, disseminates false information to artificially inflate the value of Company Z shares. If the number of violations is fixed to Investor A's single trade, the SEC would be forced to seek a civil penalty capped at Investor A's gross pecuniary gain (without an equal amount sought in disgorgement to allow the civil penalty to maintain its character as a deterrence-based penalty). A higher civil penalty could conceivably be imposed based on Investor A's potential violation of statutes governing the dissemination of false information; however, the point is that it is not difficult to imagine situations where the SEC is strained to plead that a civil penalty should exceed a defendant's gross pecuniary gain.

being allocated "in accordance with management's authorization."[174] Although FCPA violations represent a comparatively small percentage of SEC actions,[175] they make up a disproportionately large amount of the money awarded to the agency—with disgorgement constituting the brunt of the judgements.[176] The resolutions are nearly always arrived at through settlements and rarely enter civil court at all, with companies opting to quickly and quietly resolve the matter in SEC administrative proceedings.[177] The SEC also shares FCPA authority with the Department of Justice.[178] As such, the threat of criminal prosecution hangs in the wind and offers companies even more incentive to quietly comply on the SEC's terms.[179] Through this dynamic emerged the practice of lowering or removing SEC civil penalty amounts in exchange for self-reporting and cooperation during settlement proceedings—especially if there is a concurrent criminal action.[180] However, the request that the company or individual disgorge all ill-gotten profits has unwaveringly remained.[181]

FCPA violations pose a wide variety of complicated difficulties associated with *Liu* compliance. However, while FCPA liability theories and corporate comingling of legitimate and illegitimate profits certainly present an array of *Liu* issues,[182] victim identification is likely the most salient concern plaguing

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174. *See Spotlight on Foreign Corrupt Practices Act*, U.S. SEC. & EXCH. COMM'N (Feb. 2, 2017), https://www.sec.gov/spotlight/foreign-corrupt-practices-act.shtml [https://perma.cc/5869-UX2Z]; *see also* Levintow, *supra* note 108, at 186 ("Broadly speaking, the FCPA prohibits the making of improper payments to foreign government officials and requires strict recordkeeping and internal controls requirements to both deter violations and facilitate potential enforcement actions.").

175. *See* 2020 ENFORCEMENT REPORT, *supra* note 3, at 16; *see also* Levintow, *supra* note 108, at 188.

176. Levintow, *supra* note 108, at 188 (noting that 2018–19 FCPA violations made up only three percent of SEC enforcement actions but twenty-two percent of financial awards).

177. *See id.* at 199.

178. *Id.* at 200.

179. *See id.*

180. *See* Johnson et al., *supra* note 144, at 2460–63 (clarifying that this practice has only become a recent phenomenon in FCPA enforcement after 2018).

181. *See id.* The SEC has continued to disgorge funds from FCPA violators in their administrative proceedings after *Liu*. *See* Press Release, Sec. & Exch. Comm'n, SEC Charges World's Largest Advertising Group with FCPA Violations (Sept. 24, 2021), https://www.sec.gov/news/press-release/2021-191 [https://perma.cc/W34A-5VFA]. Since *Liu*, the SEC has not litigated any FCPA actions in federal court seeking disgorgement; however, the agency was recently able to procure a post-*Liu* order approving a settlement with an allotment for disgorgement. *See* discussion *infra* notes 190–208 and accompanying text.

182. The SEC often relies on a theory of *respondeat superior* to hold U.S. companies liable for their foreign subsidiaries' FCPA bribery and accounting misconduct without evincing any proof of the parent company's role in the misconduct—seemingly inapposite to the *Liu* Court's skepticism of joint and several disgorgement liability. *See* Levintow, *supra* note 108, at 208. Furthermore, *Liu*'s requirement that disgorgement be calculated with regard to legitimate business expenses is troublesome in the FCPA context, where the relevant corporations and affiliates are often large, established companies and arguably may incur legitimate operational or advisory expenses associated with performance under bribery-induced government work. *Id.* at 209–11. For a full discussion of these issues, see *id.* at 205–13.

the SEC. As the agency itself admitted before the Supreme Court, FCPA disgorgement is "not returned to investors because there really is no obvious universe of individual victims from an FCPA violation."[183] Such an admission reveals a dubious problem facing SEC disgorgement after *Liu* reaffirmed that any form of equitable relief must be encompassed by "categories of relief that were *typically* available in equity."[184] Indeed, while the Court recognized that precedent did not require a fiduciary relationship to effectuate an equitable accounting of profits, the common antecedent in each relevant piece of precedent was a *victim* for whom the wrongdoer held the profits in constructive trust.[185] To avoid transforming disgorgement into a simple money judgement, it seems sensible that the SEC would need to identify *some* beneficiary that was victimized by the act of committing an FCPA violation.[186] Investors of the implicated company seem like a good starting-point; yet the violative act in this context can *enhance* a corporation's bottom line and increase shareholder value by securing business with foreign governments.[187] Foreign governments, their citizens and "competitor[s] of the bribe-paying compan[ies]" may be victims—yet it is difficult to square how allotting disgorged funds with these parties would benefit investors[188] and otherwise forces the SEC to administer a distribution plan that is likely beyond the agency's scope and capability.[189]

With these issues facing FCPA disgorgement, it is not difficult to see why the SEC has chosen to allocate disgorged funds with the Treasury before *Liu*—and perhaps partially explains why the agency was successful in continuing to do so after *Liu*.[190] In pre-*Liu* 2020, the SEC initiated *SEC v. Berko*, an FCPA suit alleging that a defendant had received kickbacks from his role in bribing

183. Transcript of Oral Argument at 35, Liu v. SEC, 140 S. Ct. 1936 (2020) (No. 18-1501).

184. Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993).

185. Liu v. SEC, 140 S. Ct. 1936, 1944 (2020) (citing cases resolving patent-infringement disputes and "an action against the governing committee of a stock exchange"); *see id.* at 1942 ("The 'basic contours of [equitable relief] are well known' and can be discerned by consulting works on equity jurisprudence." (quoting Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 217 (2002))).

186. *See* Levintow, *supra* note 108, at 202.

187. *See id.* ("[S]hareholders of a company that bribes a foreign government official are not victims of fraud in the same way as are investors duped by a Ponzi scheme, or those whose funds are misappropriated by an unscrupulous investment adviser."). Even if an enforcement action is brought against the company, identifying shareholders as victims can be speculative as they are only pecuniarily victimized "to the extent [the] action damages the company's reputation and share price." *Id.* Further, the damage should have to neutralize the net benefit derived from the violation or handicap long-term shareholder value—inviting further debate and speculation.

188. Levintow, *supra* note 108, at 203; *see Liu*, 140 S. Ct. at 1948 (maintaining that equitable relief must satisfy § 78u(d)(5)'s requirement to be administered "for the benefit of investors").

189. *See* Levintow, *supra* note 108, at 202–03.

190. The Author is aware of a resolution similar to *Berko* regarding a market manipulation claim. *See* Judgment as to Defendant Mark J. Melnick at 3–5, SEC v. Melnick, No. 21-cv-04054 (N.D. Ga. Nov. 4, 2021). While these settlements have no legally binding value, it seems noteworthy that the SEC continues to frame its requests for relief around disgorgement.

foreign officials on behalf of a client.[191] While the suit was pending, *Liu* was decided and, in June of 2021, the parties sought court approval of their final settlement.[192] Even though the initial prayer for relief included a request for a civil penalty and disgorgement,[193] the only pecuniary remedy sought by the settlement proposal was disgorgement of net profits in the amount of $275,000.[194] In its six-page Motion for Entry of Final Judgement, the SEC filled most of the space endeavoring to justify its use of the Treasury, highlighting that *Liu* did not go as far as holding that Treasury allocation was impermissible and that placing disgorged funds in the Treasury is more equitable than the alternative—"[a]llowing the defendant to retain the funds."[195] The SEC also leaned on the recently enacted NDAA as well as various doctrines that amplify the equitable powers of the courts.[196] To the surprise of many,[197] the court accepted the settlement that same day, adopting the SEC's proposed Final Judgement and simply stating: "The Court finds that sending the disgorged funds to the United States Treasury . . . is consistent with equitable principles."[198]

Even though settlements have no legally binding precedential value, the *Berko* resolution was surprising in that (1) the SEC actively sought disgorgement for violations of the FCPA after *Liu* and (2) the court approved the proposal and its allocation of disgorgement to the Treasury. Although impossible to know what went on during settlement negotiations, a few essential characteristics of the SEC's remedial scheme are important to keep in mind in trying to reason through the outcome—whether it was correct or not. First, disgorgement has become the primary rainmaker in FCPA enforcement actions.[199] It allows the SEC to exact massive amounts of illegally obtained profit under the guise of equity, escaping the need to coordinate their penal efforts with the Department of Justice.[200] Second, if the agency rolled over and discontinued pleading disgorgement, they may often find themselves bootstrapped to

191. Complaint at 1–5, SEC v. Berko, No. 20-cv-01789 (E.D.N.Y. Apr. 13, 2020) [hereinafter Berko Complaint].

192. *See* Plaintiff's Motion for Entry of Final Judgment at 1–2, SEC v. Berko, No. 20-cv-01789 (E.D.N.Y. June 23, 2021) [hereinafter Berko Motion for Final Judgment].

193. Berko Complaint, *supra* note 191, at 36.

194. Berko Motion for Final Judgment, *supra* note 192, at 2.

195. *See id.* at 3–4.

196. *See id.* at 3–5.

197. *See, e.g.*, *In Resolving the* Berko *Enforcement Action, What About* Liu*?*, FCPA PROFESSOR (June 25, 2021), https://fcpaprofessor.com/resolving-berko-enforcement-action-liu [https://perma.cc/6LZ9-Z7SH] ("[T]he SEC ignored *Liu*'s 'and is awarded to victims' prong and encouraged the court to require Berko to nevertheless pay disgorgement which the court ordered—seemingly in violation of *Liu*.").

198. Final Judgment as to Defendant Asante Berko at 4, SEC v. Berko, No. 20-cv-01789 (E.D.N.Y. June 23, 2021) [hereinafter Berko Final Judgment].

199. *See* Johnson et al., *supra* note 144, at 2460.

200. *See id.* at 2460–62.

effectively deter FCPA violations with civil penalties alone.[201] For example, suppose an employee of a company violates one FCPA provision—15 U.S.C. § 78dd-1(a)(1)(B)—and receives $1 million in *quid pro quo* payment for a single bribe.[202] Without disgorgement, the SEC likely may *only* be able to seek a civil penalty of $1 million,[203] leaving the employee in no worse a financial position as before the violation.[204] Finally, as is relevant in *Berko*, quiet settlement of FCPA cases has become rather common practice—as has been granting the SEC's request for disgorgement.[205] In *Berko*, like many other FCPA cases,[206] the defendant simply did not litigate the merits of the violations or the relief sought[207]—making it very easy for the court to grant a historically routine request by the SEC and clear an unappealable resolution from its case docket.[208]

201. This is because FCPA violators have potential to reign in huge profits while violating very few statutes. *See, e.g.*, Berko Complaint, *supra* note 191, at 34–36. If civil penalties were only available in *Berko*—and accepting the complaint's alleged profit of $2 million—the third-tier statutory scheme would only allow the greater amount of (1) $100,000 for "each violation" or (2) $2 million (without any prejudgment interest). *See* 15 U.S.C. § 78u(d)(3)(B)(iii) (2018). The SEC alleged that the defendant violated and aided and abetted a violation of the FCPA—thus a narrow reading of "each violation" would render approximately $200,000—far less than what would be needed to deter conduct resulting in $2 million of profit. If the SEC could identify 21+ separate instances of conduct that violated the statute(s), it may be able to escape mandatory imposition of a single penalty capped at net profit.

202. *See* § 78dd-1(a)(1)(B) (forbidding inducement of a "foreign official to use his influence with a foreign government" through payment or gift).

203. *See* § 78u(d)(3).

204. Additionally, this forces the SEC to forgo a request for prejudgment interest on the disgorged profits—a regular pairing with SEC disgorgement. *See, e.g.*, SEC v. Ahmed, No. 15CV675, 2021 WL 2471526 (D. Conn. June 16, 2021) (applying prejudgment interest after *Liu*).

205. *See* Levintow, *supra* note 108, at 200 n.150 ("Not a single company fought its FCPA charges in court in 2019."); Johnson et al., *supra* note 144, at 2461 ("It is typical in FCPA resolutions that disgorgement is ordered in the SEC case and a penalty is imposed in the criminal case.").

206. *See, e.g.*, Levintow, *supra* note 108, at 200 n.150.

207. Throughout the litigation, the defendant continuously asked for extensions to respond to the complaint in light of settlement discussions. *See* Consent Motion for Extension of Time to File Answer re 1 Complaint at 1, SEC v. Berko, No. 20-cv-01789 (E.D.N.Y. Apr. 15, 2021), ECF No. 15.

208. One could also plausibly argue that the resolution of this case was shaped by a desire to put a relatively modest settlement before the court and gauge its willingness to uphold disgorgement's allocation to the Treasury. The initial complaint pled that the defendant received up to $2 million in bribes, yet the parties settled at a number *far* less more than a year later. *Compare* Berko Complaint, *supra* note 191, at 34 ($2,000,000), *with* Berko Final Judgment, *supra* note 198, at 3–4 ($275,000 plus prejudgment interest). Further, the settlement did not include any attempt at a civil penalty. *See* Berko Final Judgment, *supra*, note 198, at 3–4. There is also no public evidence of a concurrent Department of Justice suit and, if anything, it appears the defendant was less than cooperative with the SEC. *See generally* Motion for Pre-Motion Conference Concerning Service Under Fed. R. Civ. P. 4(f), SEC v. Berko, No. 20-cv-01789 (E.D.N.Y. Sept. 10, 2020) (highlighting service issues and prolongment). By exempting the civil penalty, the SEC did not give the court an easy opportunity to strike one remedy and apply the other, framing the alternative here as: "[a]llowing [the defendant] to retain his personal financial gain resulting from the alleged misconduct." Berko Motion for Final Judgment, *supra* note 192, at 4.

2. The Survival of *Kokesh* & Punitive Disgorgement

Interestingly, *Liu* never explicitly overruled *Kokesh*[209]; instead, it abrogated the SEC's use of punitive disgorgement[210] with an explicit instruction that it may only utilize equitable disgorgement in civil actions going forward.[211] However, rather than reject one form of disgorgement and accept the other, the Court seemed to go to great lengths to preserve the idea that both versions may coexist[212]—but that the SEC only has statutory power to seek the equitable version.[213] Indeed, the two decisions "make an odd pair," implying the seemingly metaphysical existence of a punitive disgorgement, while mandating that future SEC civil proceedings reflect equitable disgorgement.[214] Such a distinction would only be of note to the philosophers of federal agency pecuniary remedies—perhaps until The NDAA was passed into law in 2021.

B. *The NDAA*

After The NDAA overrode a presidential veto and became law in 2021, the SEC soon began citing section 6501 as statutory authority to seek disgorgement in civil proceedings.[215] One notable change included striking language under § 78u(d)(3)(A) that set out civil penalty eligibility for violations other than insider trading, authorizing that those violations be eligible for "disgorgement . . . of any unjust enrichment by the person who received such unjust enrichment as a result of such violation."[216] The other notable change was the addition of § 78u(d)(7)–(9)—expressly allowing "disgorgement," setting forth various statute of limitation provisions, and preserving the rights of private litigants to pursue relief.[217] With these amendments applying "to any action or proceeding that is pending on, or commenced on or after,

209. Schulp, *supra* note 44, at 223.

210. *See supra* text accompanying notes 61–75.

211. *See* Liu v. SEC, 140 S. Ct. 1936, 1946 (2020).

212. *See* Transcript of Oral Argument, *supra* note 183, at 5–6 ("[T]he notion that because we categorize it in one context, disgorgement, as a penalty, does not necessarily carry over to another. There was a great legal scholar who has been often quoted by this Court, Walter Wheeler Cook, who said the tendency to assume that a word appearing in two or more legal contexts and so in connection with more than one purpose—one purpose is statute of limitations, another is depriving the fraudster of the profits of the fraud—*to assume that characterization in one context carries over to another is a notion that has all the tenacity of original sin and must constantly be guarded against.*" (emphasis added)).

213. *See Liu*, 140 S. Ct. at 1946 ("[T]he *Kokesh* Court evaluated a version of the SEC's disgorgement remedy that seemed to exceed the bounds of traditional equitable principles. But that decision has no bearing on the SEC's ability to conform future requests for a defendant's profits to the limits outlined in common-law cases awarding a wrongdoer's net gains.").

214. *See Caselaw Developments 2020*, 76 BUS. LAW. 1069, 1076 (2021).

215. *See, e.g.*, Supplemental Authority filed by USSEC at 1, SEC v. Camarco, No. 19-01486 (10th Cir. Jan. 5, 2021).

216. *See* The NDAA § 6501(a)(1)(B)(ii); 15 U.S.C. § 78u(d)(3)(A)(ii) (2020).

217. *See* The NDAA § 6501(a)(3); § 78u(d)(7)–(9).

[January 1, 2021],"[218] commentators began postulating the immediate impacts of the new legislation,[219] and the SEC began levying arguments that the bill was implemented to alleviate *Liu*'s restrictiveness.[220] However, a close examination of the bill's language and the circumstances surrounding its enactment provide reason to doubt certainty on what section 6501 of The NDAA exactly does.

1. A Solution to an Ominous Footnote

One may float colorable arguments to the effect that section 6501 of The NDAA was a recycled statutory amendment that had been meant to address concerns brought on by *Kokesh*—not *Liu*. After *Kokesh* was decided, its impact on the SEC's ability to collect disgorgement was significant and legislators took notice.[221] When the Senate first introduced S.799, a bill with language nearly identical to section 6501 of The NDAA,[222] the defendant in *Liu* had yet to even file a petition for certiorari to the Supreme Court.[223] Over the coming months, other legislative initiatives comprised of similar language were put forward, plainly targeting the preservation of the SEC's ability to seek disgorgement after *Kokesh* called it into question and *Liu* was situated to potentially dismantle the authority outright.[224] Following the decision in *Liu*, Congress ceased putting forward disgorgement legislation—until section 6501 surfaced in The NDAA "on December 3, 2020, without any Congressional debate or discussion."[225] In substance, the only *new* item contained in section 6501 was a different statute of limitations scheme that allowed the SEC to disgorge ten-year profits for scienter-based violations and five-year profits for

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218. The NDAA § 6501(b).

219. *See, e.g.*, Adams et al., *supra* note 95, at 1–2; David Levintow, *Sorry, But the NDAA Did Not Just Redefine Disgorgement*, FCPA BLOG (Feb. 23, 2021, 7:48 AM), https://fcpablog.com/2021/02/23/sorry-but-the-ndaa-did-not-just-redefine-disgorgement [https://perma.cc/2F5F-FGZ8].

220. *See* SEC v. Blackburn, 15 F.4th 676, 681–82, 681 n.4 (5th Cir. 2021) ("The SEC argues in the alternative that the amended law applies to this case that was pending when it was enacted and gives district courts broader authority to order disgorgement than the general 'equitable relief' provision of section 78u(d)(5) that *Liu* interpreted. But we need not address this argument."); Berko Motion for Final Judgment, *supra* note 192, at 3–5.

221. *See* U.S. SEC. & EXCH. COMM'N, DIVISION OF ENFORCEMENT 2019 ANNUAL REPORT 21 (2019) ("The Division estimates that the *Kokesh* ruling has caused the Commission to forgo approximately $1.1 billion dollars in disgorgement in filed cases."); Adams et al., *supra* note 95, at 2 (detailing congressional commentary regarding *Kokesh's* impact).

222. The main substantive differences in S.799 are: (1) the inclusion of the SEC's ability to seek restitution for victims, offsetting a defendant's disgorgement liability; and (2) a five-year statute of limitations for all applications of disgorgement. *Compare* The NDAA § 6501, *with* Securities Fraud Enforcement and Investor Compensation Act of 2019, S. 799, 116th Cong. § 2 (2019).

223. *See* Application for an Extension of Time Within Which to File Petition for a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit at 4, Liu v. SEC, 140 S. Ct. 1936 (2020) (No. 18-1501); Adams et al., *supra* note 95, at 2.

224. *See* Adams et al., *supra* note 95, at 2.

225. *Id.*

non-scienter violations[226]—a consideration that seems more relevant to *Kokesh* than it is to *Liu*.[227] As to the rest, the argument that section 6501 was tailored to free the SEC from *Liu*'s restrictiveness is imperfect—"[t]he statutory language in Section 6501 . . . was crafted and debated many months before the Supreme Court issued its opinion in *Liu*."[228] Relatedly, some have read in legislative significance that disgorgement was now subject to a different statute of limitations scheme than equitable remedies.[229] Thus, one can plausibly wonder if Congress was trying to codify "disgorgement" in its punitive application as it was being applied before *Liu*, with the language contained in section 6501 having been drafted to preserve SEC disgorgement—not redefine it.

2. The NDAA's Immediate Impact

Absent a clear Congressional message that it intended to remove disgorgement from its anchoring principles in equity,[230] it would appear that *Liu* is still good law and courts will continue to cling tightly to its teachings. However, this of course does not preclude the language of section 6501 from altering how the SEC seeks disgorgement in civil enforcement proceedings.[231] For example, in *SEC v. Ahmed*, the SEC was successful in arguing that the action was "pending on" January 1, 2021 and could recover previously time-barred profits through disgorgement under the new statute of limitations for scienter-based violations.[232] The court reached its decision while relying on *Liu*, reaffirming that disgorgement calculated with regard to net profits is proper and the amount should be awarded to victims.[233] Relatedly, even without accompanying guidance detailing how the *Berko* court reached its decision to approve the SEC's Final Judgement, it seems notable that the settlement was accepted alongside the SEC's argument that The NDAA had effectively broadened its power.[234] Although many are hesitant to say that The NDAA detracts anything from *Liu*,[235] most agree

226. *See* The NDAA § 6501(a)(3).

227. *See generally* Kokesh v. SEC, 137 S. Ct. 1635 (2017) (holding that SEC disgorgement is subject to a five-year statute of limitations).

228. Adams et al., *supra* note 95, at 2.

229. *See* Samuel Bray, *The Changing Face of the SEC Restitution Remedy*, REASON (Jan. 7, 2021, 9:45 AM), https://reason.com/volokh/2021/01/07/the-changing-face-of-the-sec-restitution-remedy [https://perma.cc/6U7R-TYPW] ("It is inescapable from the text and headings that the authorized remedy of 'disgorgement' is not being classified as an equitable remedy."). *Contra* Levintow, *supra* note 219 ("[S]pelling out a longer limitations period for disgorgement in some instances should not be misinterpreted as a legislative attempt to redefine SEC disgorgement as legal restitution.").

230. *Cf.* Bray, *supra* note 229 ("[T]he word *disgorgement* doesn't tell us anything about whether the remedy sought is legal or equitable.").

231. Adams et al., *supra* note 95, at 3.

232. SEC v. Ahmed, No. 15-cv-675, 2021 WL 2471526, at *4–6 (D. Conn. June 16, 2021).

233. *See id.* at *2.

234. *See supra* notes 190–208 and accompanying text.

235. *See* SEC v. Blackburn, 15 F.4th 676, 681 n.4 (5th Cir. 2021).

that the amendment will lead to protracted investigations and litigation, accompanied by heightened expenses and a new settlement dynamic.[236]

3. The SEC's Anti-*Liu* Arguments

Just because The NDAA does not facially appear to have diminished *Liu* has not stopped the SEC from asserting that it does. First, the reference to unjust enrichment in § 78u(d)(3)(ii) seems to reinforce *Liu*—namely, that disgorgement is properly calculated at a defendant's net profits as opposed to gross profits or victim losses.[237] However, the SEC has taken that language a step further, arguing that its inclusion denotes Congress's wish that disgorgement be granted any time a defendant is unjustly enriched and without regard to whether the disgorged funds may be returned to victims or otherwise benefit investors.[238] Such an argument asks whether § 78u(d)(5) still applies with equal force to SEC disgorgement[239] or, in the alternative, whether disgorgement may be cherry-picked from the realm of equity and applied as a legal remedy[240]—even though the SEC has treated disgorgement as statutorily authorized equitable relief since The NDAA became law.[241] While this interpretation of § 78u(d)(3)(ii) has yet to be scrutinized by the courts, the SEC's position seems incompatible with the current statutory scheme and its continued designation of disgorgement as equitable relief; however, should the SEC prevail, its ability to seek disgorgement in market-harming violations would be strengthened and its use of the Treasury would likely be permissible.

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236. *See, e.g.*, Russ Ryan, *How the SEC Became the Investor's Collection Agent*, LINKEDIN (Jan. 4, 2021), https://www.linkedin.com/pulse/how-sec-became-investors-collection-agent-russ-ryan [https://perma.cc/U37Q-EMBC]; *see also* Kara Brockmeyer, Andrew J. Ceresney, Arian M. June & Robert B. Kaplan, *The SEC's Expanded Disgorgement Authority Complicates Investigations and Settlements*, DEBEVOISE & PLIMPTON (Jan. 4, 2021), https://www.debevoise.com/insights/publications/2021/01/the-secs-expanded-disgorgement-authority [https://perma.cc/5JNF-JSSH] (detailing relevant settlement considerations post-*Liu*).

237. *See* Liu v. SEC, 140 S. Ct. 1936, 1949–50 (2020).

238. *See* Brief of SEC, Appellee at 47–48, SEC v. Blackburn, 15 F.4th 676 (5th Cir. 2021) (No. 20-30464) [hereinafter Brief of SEC]; Berko Motion for Final Judgment, *supra* note 192, at 3–4.

239. And thus must "be appropriate or necessary for the benefit of investors." 15 U.S.C § 78u(d)(5) (2020).

240. *See* Ryan et al., *supra* note 75, at 183, 185; Sarah Aberg & Chris Bosch, *Legislation Misses Mark to Expand SEC Disgorgement Powers*, N.Y. L.J. (Mar. 15, 2021, 10:23 AM), https://www.law.com/newyorklawjournal/2021/03/15/legislation-misses-mark-to-expand-sec-disgorgement-powers/?slreturn=20211006002656.

241. *See e.g.*, Brief of SEC, *supra* note 238, at 47–48 (relying on equitable maxims); Berko Motion for Final Judgment, *supra* note 192, at 5 (advocating for the court to utilize expansive equitable authority); *see also* Ryan et al., *supra* note 76 at 183 ("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.").

Second, even though the SEC had withdrawn its request for disgorgement in *Govender*,[242] it seems to have resumed the practice of requesting disgorgement in insider trading cases.[243] Although this practice is questionable for reasons outlined above,[244] seeking disgorgement in an insider trading case is even more surprising post-NDAA—as the SEC has arguably lost its statutory authorization to do so. Prior to The NDAA, § 78u(d)(3)(A) set out which violations were eligible for the tiered civil penalty system in § 78u(d)(3)(B).[245] In short, every violation would be eligible for this system of civil penalty calculation *except insider trading*—which has its own civil penalty scheme.[246] After The NDAA became law, § 78u(d)(3)(A) was amended and now sets out which violations are eligible for both the tiered civil penalty system *and* disgorgement under § 78u(d)(7), exempting insider trading by reference to its respective civil penalty statute.[247] Nonetheless, the SEC has indicated its intention to continue seeking disgorgement notwithstanding the practical challenges set out in *Liu* and a seemingly incompatible statutory scheme.[248] Assuming the SEC is aware of this inconsistency, it would conceivably have to argue either that (1) The NDAA's grant of disgorgement penetrates the exempted insider trading statute—a position seemingly in tension with at least one circuit,[249] or (2) *some other* type of disgorgement exists[250] other than "disgorgement" as set out in § 78u(d)(7), subjecting it to *Kokesh*, *Liu*, and bringing us back full circle to answer the question: What does the SEC mean by "disgorgement"?[251]

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242. *See supra* notes 138–43 and accompanying text.

243. *See* Complaint & Demand for Jury Trial at 1–3, SEC v. Watson, No. 21-cv-05923 (S.D.N.Y. July 9, 2021) [hereinafter Watson Complaint].

244. *See* discussion *supra* Section III.A.1.i; *see also* JOSHUA T. LOBERT, CONG. RSCH. SERV., LSB10409, *LIU V. SEC*: THE SUPREME COURT TO CONSIDER WHETHER DISGORGEMENT IS AN EQUITABLE REMEDY IN SEC ENFORCEMENT ACTIONS 3 (2020) ("[A]s the co-director of the SEC's Division of Enforcement noted in a 2018 speech, the SEC views disgorgement as restitutionary . . . and it often uses disgorged funds *to make harmed investors whole*." (emphasis added)).

245. 15 U.S.C. § 78u(d)(3)(A).

246. *See id.*; § 78u-1(a).

247. *See* 15 U.S.C. § 78u(d)(3)(A) (2020); § 78u-1(a).

248. *See* Watson Complaint, *supra* note 243, at 1–3.

249. *See generally* SEC v. Rosenthal, 650 F.3d 156 (2d Cir. 2011) (holding that the SEC may not disregard insider trading's separate statute for profits-based penalty calculation and, instead, seek a tiered penalty at a statutory amount, even though the traders did not gain any profits or avoid any loses).

250. Likely under § 78u(d)(5) as equitable relief and necessarily arguing that § 78u(d)(7) encompasses a legal remedy. However, this would be inconsistent with the SEC's current treatment of § 78u(d)(7). *See supra* note 241 and accompanying text.

251. *Cf.* Aberg & Bosch, *supra* note 240 ("[T]he statute falls short even here because it leaves room for defendants to argue that a remedy fashioned as disgorgement that operates as a penalty is not, in fact, disgorgement, but a penalty subject to § 2462's five-year statute of limitations, bringing the matter full circle back to the holding in *Kokesh*.").

III. Disgorgement Should Not Be Applied to Market-Harming Violations

At the end of the day, the courts, the Government, and academics are all engaged in helpless semantics, arguing that "disgorgement" has a definitive meaning where the remedy's use has been, at best, amorphous.[252] To be sure, equitable concepts like constructive trusts have unquestionably enjoyed a historic place in the English courts of equity; however, its purported progeny is plagued by its recent nomenclature[253] and protean character.[254] While disgorgement's role may be easily enough understood in cases involving investment adviser violations[255] or small-cap offering frauds,[256] violations that harm the broader securities markets dwell in a gray area—stretching settled principles of equity to their limits and "invit[ing] decades of unproductive litigation just to figure out what [legislators] mean."[257] Indeed, a broader question presents itself concerning whether the SEC should be in the business of distributing private losses at all[258]; however, it should be accepted that the SEC at least possess the tools necessary to deter future securities law violations—whether those violations harm the market as a whole or not.

A. *The Public Cost of Deterrence*

In order to protect the investing public, the SEC "vigorously enforce[es] the federal securities laws to hold wrongdoers accountable and deter future misconduct."[259] Indeed, deterrence is a quintessential function of the SEC, and, through the use of both disgorgement and civil penalties, the Commission has been able to meet its objective by attaining financial judgements that consistently exceed a wrongdoers' financial gain.[260] Briefly, disgorgement is set at the amount of ill-gotten profits, and then a civil penalty is imposed to leave the wrongdoer worse off than before the violation.[261] The civil penalty

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252. Transcript of Oral Argument at 52, Kokesh v. SEC, 137 S. Ct. 1635 (2017) (No. 16-529) (noting that there is nothing that requires disgorgement to necessarily entail distribution to victims because "[w]e're just making it up").

253. *See* Liu v. SEC, 140 S. Ct. 1936, 1950–53 (2020) (Thomas, J., dissenting).

254. *Liu*, 140 S. Ct. at 1943 (majority opinion).

255. *See, e.g.*, SEC, v. Kellen, No. CV 20-3861, 2021 WL 4907238, at *3–5 (C.D. Cal. Sept. 14, 2021); *see also* Levintow, *supra* note 108, at 202 ("[S]hareholders of a company that bribes a foreign government official are not victims of fraud in the same way as are investors duped by a Ponzi scheme, or those whose funds are misappropriated by an unscrupulous investment adviser.").

256. *See, e.g.*, SEC v. Blackburn, 15 F.4th 676, 681–82 (5th Cir. 2021).

257. Ryan, *supra* note 236.

258. *See id.*

259. *What We Do*, U.S. Sec. & Exch. Comm'n (Nov. 22, 2021), https://www.sec.gov/about/what-we-do [https://perma.cc/RRW8-KSKQ].

260. *See The Securities Law Enforcement Remedies Act of 1989: Hearing on S.647 Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., and Urb. Affs.*, 101st Cong. 32 (1990) (statement of Richard C. Breeden, Chairman, Sec. & Exch. Comm'n) [hereinafter Breeden statement].

261. *See id.*

is frequently calculated at "the gross amount of pecuniary gain," often mirroring the amount sought in disgorgement.[262] Thus, the two remedies have become codependent on each other to achieve deterrence, where the absence of one could lead to situations where "the maximum liability economically is to return all the ill-gotten gains."[263]

Although deterrence remains a primary objective for the SEC,[264] its reliance on disgorgement as a quasi-punitive remedy and recent commitments to return money to investors[265] have potential to overshadow the agency's deterrence-based duties. As noted, coupling disgorgement with a civil penalty has become a near-necessary practice to financially deter violations of the securities laws.[266] Where this presents issues is trying to apply disgorgement, a remedy the SEC still treats as equitable,[267] to violations that are seemingly incompatible with equitable relief while arguably still constrained that such equitable relief "be appropriate or necessary for the benefit of investors."[268] This presents a Sophie's choice to the agency: pervert traditional notions of equity jurisprudence or welcome challenges to the current civil penalty scheme's ability to administer deterrence-based punishment on its own.

Rather than balk when faced with this choice, the SEC appears to have doubled down, continuing to seek disgorgement in market-harming securities violations and pledging its commitment to returning disgorged funds to victims—even where there are no victims before it.[269] Outside of the public costs associated with establishing a new office dedicated to victim distribution, the SEC's choice is an expensive one.[270] In effect, the SEC challenges itself—and the courts—to fit modern market-harming securities violations into the remedial scheme contemplated by the English Court of Chancery in 1789.[271] This will result in years of quarreling to determine disgorgement's scope, painstaking efforts by the SEC to exhaust necessary avenues of victim identification, and a massive litigation bill for the American public—accompanied by an invoice for victim distribution.[272] In the midst of all these

262. *See* LOBERT, *supra* note 244, at 4 (internal quotation marks omitted) (quoting 15 U.S.C. § 789(d)(3)(B)).

263. Breeden statement, *supra* note 260, at 32. As noted above, this problem can be mitigated by calculating a civil penalty by multiplying a set statutory amount "for each violation" in appropriate cases. *See* text accompanying notes 170–73.

264. *See* 2020 ENFORCEMENT REPORT, *supra* note 3, at 9.

265. *See, e.g.*, Press Release, Sec. & Exch. Comm'n, SEC Names Nichola L. Timmons Chief of New Office of Bankruptcy, Collections, Distributions, and Receiverships (Oct. 7, 2020), https://www.sec.gov/news/press-release/2020-250 [https://perma.cc/Q5B5-9U3H].

266. *See supra* text accompanying notes 259–63.

267. *See supra* note 241 and accompanying text.

268. *See* 15 U.S.C. § 78u(d)(5) (2020).

269. *See id.*; Ryan, *supra* note 236.

270. *See* Ryan, *supra* note 236.

271. *See* Liu v. SEC, 140 S. Ct. 1936, 1951 (2020) (Thomas, J., dissenting).

272. *See* Ryan, *supra* note 236.

concerns, private rights of action for injured investors continue to exist,[273] and one may sensibly wonder how important *it really is* to keep disgorgement around.

B. *INSIDER TRADING CIVIL PENALTIES AS AN ALTERNATIVE FRAMEWORK*

Without passing judgement on the SEC's role in profits distribution,[274] disgorgement appears to function well enough in cases where there exists a limited class of harmed investors and will continue to efficiently deter future misconduct in its quasi-punitive form.[275] However, the same cannot be said for market-harming violations. Subject to infirmities regarding victim identification and distribution, there exists a multitude of arguments and questions to tease out before the SEC can confidently seek disgorgement and allocate the funds to the Treasury.[276]

Rather than have the SEC go through years of protracted litigation to address these infirmities—and potentially lose the ability to seek disgorgement at all in discrete circumstances—Congress should pass legislation making all market-harming securities violations eligible for the civil penalty scheme seen in insider trading violations. As discussed above,[277] insider trading civil penalties are calculated at an amount "not [to] exceed three times the profit gained or loss avoided as a result of such unlawful purchase, sale, or communication."[278] A civil penalty calculated in multiples of one's unlawful profit properly (1) deprives the wrongdoer of his financial gain and (2) serves as a deterrent by leaving the wrongdoer worse off than before the violation.[279] By solely relying on a civil penalty in these contexts, the SEC would enjoy explicit authorization to allocate the sum of funds to the Treasury[280] *and* reserve the right to disburse the sum to a disgorgement fund.[281] Finally, and with a wave to the 116th Congress, the statute of limitations for violations subject to this civil penalty scheme should begin running "after the latest date of the violation that gives rise to the action"[282] and be expanded to reflect a ten-year

273. *See id.*; *see also* § 78u(d)(9) ("Nothing in paragraph (7) may be construed as altering any right that any private party may have to maintain a suit for a violation of this chapter.").

274. *See* Ryan, *supra* note 236.

275. *See, e.g.*, SEC v. Blackburn, 15 F.4th 676, 682 (5th Cir. 2021) ("The district court's order—requiring disbursements to already-identified victims with court supervision to ensure compliance with that edict—easily satisfies *Liu*. We do not hold that this scheme is the only way to satisfy *Liu* as other cases may present greater challenges for ensuring that disgorgement benefits victims." (footnote omitted)).

276. *See supra* Part III.

277. *See supra* text and accompanying notes 145–51.

278. 15 U.S.C. § 78u-1(a)(2) (2020).

279. *See generally* SEC v. Govender, No. 18-cv-7685, 2020 WL 5758997 (S.D.N.Y. Sept. 28, 2020) (applying a civil penalty at two times the defendant's profits).

280. *See* § 78u-1(d)(1).

281. *See id.*; § 7246.

282. § 78u(d)(8)(A).

statutory period for scienter-based violations, enabling the Commission to calculate its civil penalty amount based on long instances of conscious fraud.[283]

C. A CIVIL PENALTY-BASED SCHEME'S IMPLICATIONS

Even though disgorgement constitutes the brunt of money judgements in SEC litigation,[284] this modification to the statutory scheme should not diminish the agency's ability to recover from wrongdoers. Given that orders for disgorgement and civil penalties are often calculated equally,[285] applying a two-times profits-based civil penalty will render approximately the same amount in most cases, reserving the right to seek up to three times the profit to account for prejudgment interest or especially egregious conduct. Sole reliance on a civil penalty for market-harming violations would also alleviate the need to manufacture a class of victims or litigate whether the penalty is for the benefit of investors—a civil penalty is justified whenever an individual has violated a provision of the relevant securities laws.[286] Further, and as would be equally noteworthy to defendants, the two remedies are generally treated similarly in bankruptcy as non-dischargeable debts.[287] In sum, the SEC would be able to achieve nearly identical results as they currently do—but far more efficiently.

Should the SEC solely rely on civil penalties in its enforcement proceedings, the main differences would be procedural ones. For example, if the SEC seeks disgorgement, it is only required to put "a reasonable approximation of" ill-gotten profits before the court, at which point the burden shifts to the defendant to rebut the calculation.[288] While this is certainly a useful procedural tool, its absence would likely not be that impactful in insider trading and market manipulation cases because a defendant's profits can be easily calculated by analyzing their trading activity,[289] thus posing little risk for uncertainty. FCPA violations present more risk of uncertainty when calculating a defendant's profits; however, it is difficult to conclude that this consideration outweighs the benefits of avoiding disgorgement-related disputes during litigation or settlement—especially where most companies cooperate with the SEC anyway.[290]

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283. The current statute of limitations for civil penalties is five years. *See* Gabelli v. SEC, 568 U.S. 442, 454 (2013).

284. *See* 2020 ENFORCEMENT REPORT, *supra* note 3, at 17.

285. *See, e.g.*, Johnson et al., *supra* note 144, at 2461; *see* sources cited *supra* note 28.

286. *See* §§ 78u(d)(3)(A), 78u-1(a)(1).

287. *See, e.g.*, SEC v. Palmisano, 135 F.3d 860, 866 (2d Cir. 1998) ("[D]isgorgement and penalty orders are not dischargeable in bankruptcy."). *But see* Holly Baird, Comment, *The Preclusive Effect of Disgorgement Orders in Non-Dischargeability Actions Under § 523(a)(19)*, 30 EMORY BANKR. DEV. J. 383, 396–405 (2014) (describing discreet instances of disgorgement orders being dischargeable by relief or nominal defendants who did not participate in the fraud itself).

288. Ryan, *supra* note 1, at 4–5 (internal quotation marks omitted).

289. *See, e.g.*, SEC v. Happ, 392 F.3d 12, 31–32 (1st Cir. 2004).

290. *See* Johnson et al., *supra* note 144, at 2461–62.

Another consideration is that, if the SEC only brings a claim for disgorgement, it can argue that a defendant has no right to a jury trial based on traditional equity jurisprudence.[291] Yet, this consideration is more notable to civil procedure students than it is in practice, as the SEC almost categorically applies both legal and equitable remedies to currently accomplish its deterrence-based objectives.[292] Thus, solely relying on a legal remedy and waiving the argument that their claim is equitable would be of little consequence. Of some significance, however, is that defendants are unable to attain tax deductions stemming from civil penalties, while, after *Liu*, there is room to argue that disgorgement orders rooted in equitable restitution are tax deductible.[293] This seems more relevant to the Internal Revenue Service than it is to the SEC, where market-harming wrongdoers will be unable to offset their federal tax liability after they have engaged in unlawful conduct; however, the consideration could be relevant to settlement discussions and reaching an appropriate civil penalty amount.[294] Finally, to the extent sympathy still exists for a class of victims in market-harming violations, "there's no shortage of private legal claims available against securities-law violators, nor private attorneys incentivized to pursue them."[295]

CONCLUSION

The SEC's mission to deter violations of the securities laws is of vital importance—and its commitment to investor reimbursement, a noble endeavor. While both objectives have historically been served by requiring that defendants disgorge their ill-gotten profits, the SEC's overreliance on the remedy has exposed it to an array of litigable issues and, absent an alternative framework, will challenge the efficiency by which the agency carries out its duties for years to come. Where deterrence is concerned, returning disgorged funds to investors must take a backseat; and where a statutory scheme requires identifiable victims to seek deterrence-based remedies, it must be revamped. Our capital markets are increasingly modern; there should be little reason to consult the equity courts of eighteenth-century England on how to police them.

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291. *See* SEC v. Rind, 991 F.2d 1486, 1488 (9th Cir. 1993).

292. *See supra* Section IV.A.

293. *See* David Petron, Nathan Clukey & Laura Barzilai, *Preserving Disgorgement Tax Deductibility in SEC Settlements*, SIDLEY AUSTIN (Oct. 18, 2021), https://www.sidley.com//media/publications/law360—preserving-disgorgement-tax-deductibility-in-sec-settlements.pdf?la=en [https://perma.cc/4QAD-45CH].

294. *Cf. id.* ("With proper planning and preparation, however, parties who settle SEC enforcement actions involving disgorgement may be able to satisfy the identification and establishment requirements to claim a deduction for federal tax purposes.").

295. Ryan, *supra* note 236.