

The FTC Reargues its 13(b) Case, While Congress Appears Set to Enhance the SEC's Ability to Seek Disgorgement, Suggesting A Legislative Push on 13(b) Next Session

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Section 13 (b)log



Earlier this week, the Federal Trade Commission re-stated its position to the Supreme Court, arguing that there is no "clear legislative command" to restrict the traditional powers of equity. In other words, courts of equity could do just about anything, and since an injunction is equitable relief, an injunction can equal monetary restitution as well. No real surprises here.

But the obvious problem remains: that's not what the statutory text says. And we are not in a court of equity, but a court of law, dealing with a statutory provision that allows for injunctions and does not allow for monetary remedies. With argument set before an increasingly textualist Supreme Court in mid-January, the judicial field seems tilted in the wrong direction for the FTC.

Which very well means that the real fight will come later, in Congress. And while we wait for the Supreme Court's decision to clarify the FTC's enforcement authority, it is unclear how long that clarification will stick. In considering this issue, it is useful to consider Congress's pending action to clarify the penalty authority of another independent agency, SEC, an effort that is gathering some steam.

As part of its annual defense policy bill, Congress is poised to enhance the SEC's ability to pursue violations of the securities laws. Specifically, Section 6501 of [H.R. 6395](#), the *FY21 National Defense Authorization Act* (NDAA) – as agreed to by House and Senate negotiators – would provide statutory authority for the SEC to seek disgorgement as a remedy for unjust enrichment gained through a securities law violation. The bill establishes up to a 10-year statute of limitations for disgorgement and a 10-year statute of limitations for equitable remedies.

Section 6501 of the defense bill largely mirrors Title V of Senator Mark Warner's (D-VA) anti-money laundering bill, the *ILLICIT CASH Act* (S. 2563) (itself incorporated into the defense bill) – although does not include restitution as Warner's bill does. The language is also similar to H.R. 4344, the *Investor Protection and Capital Markets Fairness Act*, authored by Representatives Ben McAdams (D-UT) and Bill Huizenga (R-MI). H.R. 4344 passed the House in November 2019 by a vote of 314-95 and was endorsed by SEC Chairman Jay Clayton. We [wrote](#) about the prospects for, and broader implications of, these bills in January.

The NDAA – and with it, these new tools for the SEC – is expected to be passed by both chambers of Congress next week, notwithstanding a Presidential veto threat. When it comes to 13(b), however, despite some recent (and mild) [momentum](#), Congressional action to clarify the FTC's Section 13(b) authority seems far less certain with just a handful of days left this session. But it is certainly something to watch closely once the 117th Congressional session convenes in 2021.