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DISGORGEMENT RECONSIDERED: RULE 105 AND THE ADVISER-CLIENT DIVIDE

Over the past decade, judicial decisions have progressively narrowed the SEC's disgorgement authority, emphasizing statutory limits and the need for investor-specific harm. While Congress and some courts have resisted these constraints, the enforcement settlement in Sourcerock *(2025) demonstrates that the Commission may now be more cautious in pursuing disgorgement, particularly in actions involving violations by investment advisers that result in financial benefits to advisory clients. This article discusses this development, and the broader questions raised about the future of disgorgement in SEC enforcement.*

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INTRODUCTION

The Supreme Court and federal courts of appeals have repeatedly narrowed the Securities and Exchange Commission's disgorgement authority over the past decade. Starting with *Kokesh* (2017), the Court held that disgorgement is subject to a five-year statute of limitations period. *Liu* (2020) followed and required disgorgement to be limited to net profits and directed, where feasible, to victims rather than the Treasury. The Second Circuit's decision in *Govil* (2023) pushed further, insisting that disgorgement is unavailable absent proof of identifiable investor harm. While Congress extended the limitations period for certain violations in the National Defense Authorization Act in 2021 and courts like the Ninth Circuit in *Sripetch* (2025) have disagreed with the decision in *Govil*, there is no doubt that the scope of the SEC's disgorgement authority has been increasingly constrained.

A recent enforcement settlement suggests that the Commission itself is also turning a critical eye on the scope of its disgorgement powers. *Sourcerock* (2025) involved an investment adviser's alleged violation of Rule 105 promulgated under Reg M, which prohibits shorting into an offering. Historically, including as recently as 2024, the SEC has ordered investment advisers to disgorge the proceeds obtained by clients because of the adviser's violation of Rule 105. In *Sourcerock*, the Commission abandoned this long-running approach and declined to order disgorgement as part of the settlement. This about-face seems to reflect an increasingly restrictive view of the Commission's disgorgement authority. *Sourcerock* both suggests that the current SEC will not seek disgorgement in Rule 105 actions involving investment advisers and simultaneously raises intriguing questions about whether other resolutions involving other violations by investment advisers that benefit advisory clients will not

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