Liu and the New SEC Disgorgement Statute

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ABSTRACT

In early 2021, Congress enacted a new statute for enforcement cases brought by the Securities and Exchange Commission. The new statute resolved important questions about the availability of disgorgement as a remedy in SEC enforcement cases, but it created other questions. The purpose of this Article is to discuss one interpretive issue that is already arising in the federal courts of appeals.

That interpretive issue is whether “disgorgement” as authorized by the new statute must abide by equitable limitations the Supreme Court imposed on disgorgement relief in SEC cases in Liu v. SEC, 140 S. Ct. 1936 (2020). The statute was passed about six months after the Liu decision, which had found that disgorgement in an SEC enforcement case is an equitable remedy when it complies with three longstanding principles of equity: a defendant’s gains should be returned to wronged investors for their benefit; the disgorgement order should not extend to several wrongdoers under a joint-and-several liability theory; and disgorgement should not exceed the net profits from wrongdoing after deducting legitimate expenses. Does the new statute incorporate the Liu decision and equitable principles?

Answering that question is not straightforward. A careful review of the text, context, and legislative history of the new statute does not provide a persuasive basis to conclude that the new statute is meant to adopt equitable principles and define disgorgement

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the way Liu did. Neither the text of the statute nor materials from Congress commented with approval or disapproval of Liu. Canons of statutory interpretation are largely not helpful either.

A better approach to understanding the new statute is to think separately about the different equitable principles found in Liu and to analyze the statute to reach an appropriate interpretation of each one. The statutory text defining disgorgement as unjust enrichment the defendant “received” supports the application of a strict form of the Liu limitation preventing one defendant from being ordered to disgorge profits a different person received. A part of a 2010 securities enactment provides a solid ground for rejecting the Liu limitation requiring the return of disgorgement amounts to injured investors. Finally, a canon of construction provides a basis for applying the Liu principle limiting an award to net profits from wrongdoing after deducting legitimate expenses.
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INTRODUCTION

Congress made a major change to the enforcement provisions of the Securities Exchange Act on the first day of 2021. There it is, big as life, on pages 1238 and 1239 of an enactment of 1,480 pages. Oh, and it is not in “An Act to Amend the Securities Laws.” It is buried within the 2021 National Defense Authorization Act, the bill to fund the armed services. Where else would it be? Credit for spotting this nugget belongs to sharp-eyed securities lawyers who immediately commented on it.

The legislation resolved a debate that has roiled the securities enforcement bar for many years. May the SEC obtain a disgorgement remedy from a defendant in a federal court case, and if so, what statute of limitations governs a claim for disgorgement? The new statute allows a federal court to order disgorgement in an SEC enforcement case and imposes a limitations period of five or ten years.

Disgorgement is a financial sanction requiring a defendant to pay the profits received from a securities law violation. The calculation is the amount of the defendant’s unjust enrichment or ill-gotten gains causally connected to the violation and not the loss sustained by any particular victim or group of victims.

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2 Id. at 4625–26 (to be codified at 15 U.S.C. § 78u(d)(3), (7)–(9)).
3 Id. at 3388.
7 See id. (“[T]he primary purpose of disgorgement . . . is to deprive violators of their ill-gotten gains.”); SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989) (“[D]isgorgement need only be a reasonable approximation of profits causally connected to the violation.”); SEC v. Blavin, 760 F.2d 706, 713
Disgorgement is a major part of SEC enforcement cases and involves a lot of money each year. In the fiscal year ending September 30, 2022, the amount of disgorgement ordered in SEC court cases and through administrative proceedings was $2.25 billion. In fiscal year 2021, the amount was $2.4 billion.

The new disgorgement statute is not a model of careful legislative drafting and creates many questions of interpretation. Scholars should address these issues because federal courts and lawyers will inevitably face them in SEC enforcement cases.

The purpose of this Article is to discuss one interpretive question courts are already encountering. The statute passed within months of the Supreme Court decision in Liu v. SEC, which found that disgorgement in an SEC enforcement case is an equitable remedy when it complies with three longstanding principles of equity: (1) a defendant’s gains are returned to wronged investors for their benefit; (2) the disgorgement order does not extend to several wrongdoers under a joint-and-several liability theory; and (3) disgorgement does not exceed the net profits from wrongdoing after deducting legitimate expenses. The important interpretive question is whether “disgorgement” as authorized by the new statute must abide by the equitable limitations the Liu Court described. Does the new statute incorporate the Liu decision and equitable principles? 

(6th Cir. 1985) (internal quotations omitted) ("The purpose of disgorgement is to force a defendant to give up the amount by which he was unjustly enriched rather than to compensate the victims of fraud."); SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102 (2d Cir. 1978) ("[T]he primary purpose of disgorgement is not to compensate investors . . . . [I]t is a method of forcing a defendant to give up the amount by which he was unjustly enriched.").


11 140 S. Ct. 1936 (2020).

12 See id. at 1947–50.

13 Several appellate judges have addressed the issue. See SEC v. Hallam, 42 F.4th 316, 336–37 (5th Cir. 2022); see SEC v. Camarco, No. 19-1486, 2021
An easy answer to that question probably should exist, but it does not. Standard methods of statutory interpretation—examination of text, context, structure, legislative history, judicial precedent, and canons of construction—point in different directions or fail to produce a convincing resolution. They do not demonstrate that Congress wanted the terms disgorgement and unjust enrichment in the new statute to be treated as equitable remedies with the traditional equitable limitations the Court found in *Liu*, and they do not lead to the conclusion that Congress otherwise wanted to adopt the Supreme Court’s *Liu* decision or its reasoning to incorporate equitable principles.

This Article, therefore, has two purposes. One is to examine the new SEC disgorgement statute to explore whether it adopts the *Liu* equitable limitations. Second, in many ways, the Article is a comment on Congress’s current method of legislating, prevailing theories of statutory interpretation, and the ability of courts, federal agencies, and legal advisers to reach reliable understandings of the meaning of federal legislation. The process is more difficult than it should be.

The plan is to consider these questions by beginning with two preliminary topics to provide the necessary background. Part I briefly reviews three Supreme Court decisions on disgorgement or the statute of limitations in SEC enforcement cases, culminating in *Liu*. Part II describes the text of the new disgorgement statute.

WL 5985058, at *25 (10th Cir. Dec. 16, 2021) (Bacharach, J., dissenting); see also infra Section III.D.


Part III then addresses the relationship between Liu and the new disgorgement statute, starting with considerations based on the text. It also reviews congressional actions leading to the new statutory language and the absence of any indication that Congress or the members leading the legislative effort wanted the law to follow Liu.\textsuperscript{16} Other context, such as the closeness in time between the Liu decision and the enactment of the disgorgement statute, does not, by itself, imply a congressional desire to adopt Liu.\textsuperscript{17}

Part III also discusses presumptions or canons of statutory interpretation, including a section of Liu that said the meaning of disgorgement in federal statutes should be deemed to contain the limitations on its availability that equity typically imposes.\textsuperscript{18} That conclusion, if it were binding or persuasive, would apply to the new disgorgement statute and would incorporate the Liu decision, but the reasoning of that discussion in Liu is subject to several objections.\textsuperscript{19}

Other canons discussed in Part III assume that when a word or term in a statute has an authoritative, well-settled, or established legal meaning, Congress intended that meaning.\textsuperscript{20} An argument would be that Liu was an authoritative construction of disgorgement by the Supreme Court, but that would not be correct. The question in Liu was about forms of equitable relief, not the proper definition or meaning of disgorgement in the securities laws or federal law more broadly.\textsuperscript{21}

Part IV comes at the Liu issues in a different way that proves to be more productive. It applies standard methods of statutory interpretation to determine the new statute’s position on each separate equitable limitation in Liu.\textsuperscript{22} Part IV explains:

- The statutory text supports the limitation preventing one defendant from being ordered to disgorge profits a different person received. The new statute defines disgorgement as “unjust enrichment by the person

\textsuperscript{16} See infra Section III.B.
\textsuperscript{17} See infra Section III.B.1.
\textsuperscript{18} See infra Section III.C.1.
\textsuperscript{19} See infra notes 223–35 and accompanying text.
\textsuperscript{20} See discussion infra Section III.C.2.
\textsuperscript{21} See infra Section III.D.
\textsuperscript{22} See discussion infra Part IV.
who received such unjust enrichment as a result” of the violation.

• The text and legislative history say nothing about requiring the distribution of recovered amounts to victims of the wrongdoing, but Congress made its views known in a 2010 statute. Congress created an account for certain SEC purposes to receive any disgorgement collected by the SEC “that is not added to a disgorgement fund . . . or otherwise distributed to victims of a violation of the securities laws.”23 The 2010 statute is context for the new disgorgement statute, showing that Congress wanted a disgorgement order in SEC cases to proceed even if the money could not be returned to injured investors.

• The text and legislative history of the disgorgement statute do not address limiting an award to net profits from wrongdoing after deducting legitimate expenses, but a standard aid to statutory interpretation provides guidance on that factor. One canon of construction states that a statutory word with an established legal meaning should be construed in accordance with that meaning. The canon should apply here because the history and context of the statute show that the terms disgorgement and unjust enrichment carry their legal meanings as forms of relief in legal proceedings instead of their ordinary public meaning. A well-established rule in the law of unjust enrichment is that disgorgement should be only net profit after allowing credit for certain expenditures the defendant made. This general rule corresponds to the equitable limitation in Liu.24

Courts, the SEC, and legal advisers should analyze questions about disgorgement under the new statute as matters of statutory interpretation. They are no longer questions about legal versus equitable remedies or about a court’s equitable powers to

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develop ancillary relief. The new statute does not provide an answer to every question about disgorgement in SEC cases, but the practice of courts over many years of ordering and calculating disgorgement in SEC and other cases provides valuable guidance that can help resolve questions the statute does not answer.

I. Supreme Court Decisions Relevant to the New SEC Disgorgement Statute

The Supreme Court addressed issues about disgorgement or the statute of limitations in SEC enforcement cases in three decisions starting in 2013. In Gabelli v. SEC, the SEC sought civil monetary penalties and raised a question under the general federal five-year limitations period in 28 U.S.C. § 2462 for fines, penalties, and forfeitures. The Court held that the statute of limitations began to run when the alleged misconduct occurred and not when the SEC discovered or should have discovered the violation.

In Kokesh v. SEC, the Court held that the five-year limitations period applied to SEC requests for disgorgement in federal court because disgorgement, as applied in SEC enforcement cases, operated as a penalty. It operated as a penalty because it was a sanction for violating a law to protect the public generally rather than an injured person and the primary purpose of the relief was to deter. Another reason was that disgorgement was not compensatory. It was not required to be paid to injured investors as compensation, and it was not always paid to victims when courts used their discretion to decide how to distribute the money. Finally, disgorgement operated as a penalty because it sometimes exceeded the profits a specific defendant gained from a violation. Defendants had been denied deductions for legitimate expenses that reduced illegal profit, and tippers had been liable

26 Id. at 444–49.
27 Id. at 451–54.
29 Id. at 457, 467.
30 Id. at 463–65.
31 Id. at 465–66.
for the profits made by tippees.\textsuperscript{32} In a footnote, the Court left open whether a federal court had the authority to award disgorgement in an SEC enforcement case.\textsuperscript{33}

Then, in \textit{Liu v. SEC},\textsuperscript{34} the Court answered the question left open in \textit{Kokesh}.\textsuperscript{35} It held that section 21(d)(5) of the Exchange Act, which empowers federal courts to grant “equitable relief” for the benefit of investors, gave federal courts the authority to enter an order obliging a defendant in an SEC enforcement case to disgorge wrongful profits, but only if the disgorgement order stays within the bounds of three traditional principles of equity.\textsuperscript{36}

First, the equitable “profits remedy often imposed a constructive trust on wrongful gains for wronged victims.”\textsuperscript{37} “The equitable nature of the profits remedy generally requires the SEC to return a defendant’s gains to wronged investors for their benefit.”\textsuperscript{38}

The Court was aware that the SEC did not always return disgorgement proceeds to investors and “instead deposit[ed] a portion of its collections in a fund in the Treasury.”\textsuperscript{39} The Department of Justice and SEC defended the practice of depositing disgorgement funds with the Treasury when it was not feasible to distribute them to investors.\textsuperscript{40}

The Court was not fully satisfied with this position. Briefing in the case had not identified equitable principles giving guidance when a wrongdoer’s profits could not practically be disbursed to the victims.\textsuperscript{41} In addition, section 21(d)(5) permitted only those forms of equitable relief “appropriate or necessary for

\textsuperscript{32} \textit{Id.} at 466.
\textsuperscript{33} \textit{Id.} at 461 n.3 (“Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings . . . .”).
\textsuperscript{34} \textit{Liu v. SEC}, 140 S. Ct. 1936 (2020).
\textsuperscript{35} \textit{Id.} at 1940–41.
\textsuperscript{36} \textit{Id.} at 1940, 1948–50. Section 21(d)(5), 15 U.S.C. § 78u(d)(5), states: “In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.”
\textsuperscript{37} \textit{Liu}, 140 S. Ct. at 1944.
\textsuperscript{38} \textit{Id.} at 1948.
\textsuperscript{39} \textit{Id.} at 1947.
\textsuperscript{40} \textit{Id.} at 1948.
\textsuperscript{41} \textit{Id.}
the benefit of investors,” and the majority’s view was that this statutory phrase “must mean something more than depriving a wrongdoer of his net profits alone.”

Ultimately, the Liu majority left open questions about the deposit of disgorgement amounts in the Treasury. A lower court contemplating the deposit of disgorgement in the Treasury would need to evaluate whether such an order was “consistent with equitable principles” and would be for the benefit of investors as required by section 21(d)(5).

Second, equity courts generally did not award a remedy such as disgorgement against several wrongdoers under a joint-and-several liability theory. Equity did not impose joint-and-several liability for profits that accrued to another person, but it did “permit liability for partners engaged in concerted wrongdoing” and therefore allowed some flexibility to impose collective liability. The majority left it to the lower courts, on remand, to determine whether the relationship between the defendants in the case permitted them to be found liable for profits as partners in wrongdoing.

Third, courts limited disgorgement to the net profits from wrongdoing after deducting legitimate expenses. Personal expenses or expenses too closely associated with wrongful activity would not be proper deductions, but items with a “value independent of fueling a fraudulent scheme” would be. Liu directly raised the deductibility of certain expenses because both the district court and the court of appeals had declined to deduct expenses.

The majority acknowledged that specific questions and details about all three limitations remained to be worked out.

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42 *Id.*
43 *Id.* at 1948–49.
44 *Id.*
45 *Id.* at 1945.
46 *Id.* at 1949.
47 *Id.* (noting several potentially relevant factors).
48 *Id.* at 1945–46.
49 *Id.* at 1945–46, 1950.
50 *Id.* at 1942.
51 *Id.* at 1947.
but a disgorgement order meeting them would be equitable.\textsuperscript{52} The reasoning of the decision meant that the five-year statute of limitations for a penalty would not apply to a properly limited disgorgement award because equity does not enforce a penalty.\textsuperscript{53}

\textit{Liu}, therefore, held that a disgorgement order could qualify as equitable relief under section 21(d)(5). To do so, (1) the disgorgement amount should be returned to wronged investors for their benefit; (2) a wrongdoer should be ordered to disgorge only his own profits; and (3) the disgorgement amount should not exceed the net profits from wrongdoing after deducting legitimate expenses.

\section*{II. The New Disgorgement Statute}

The new SEC disgorgement statute, section 6501 of the 2021 National Defense Authorization Act,\textsuperscript{54} became law after the three Supreme Court decisions and has two main parts. The first is an amendment to section 21(d)(3)(A) of the Exchange Act and a new section 21(d)(7) that authorize the SEC to seek and a federal court to order disgorgement against a person who commits a violation of the federal securities laws.\textsuperscript{55} Disgorgement is defined in section 21(d)(3)(A)(ii) as “any unjust enrichment by the person who received such unjust enrichment as a result of such violation.”\textsuperscript{56}

The second legislative change is the statute of limitations framework to be added as section 21(d)(8).\textsuperscript{57} The SEC may not bring a claim for disgorgement in federal court “later than 5 years after the latest date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim occurs” or later than 10 years after the latest date of a violation “for which scienter must be established,”\textsuperscript{58} such as a Rule 10b-5

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 1940, 1949–50.
\item NDAA § 6501, 134 Stat. at 4625.
\item 15 U.S.C. § 78u(d)(3)(A); \textit{id.} § 78u(d)(7).
\item \textit{Id.} § 78u(d)(8).
\end{enumerate}
\end{footnotesize}
case. The legislation added a ten-year statute of limitations for claims for equitable remedies in section 21(d)(8)(B): “The Commission may seek a claim for any equitable remedy, including for an injunction or for a bar, suspension, or cease and desist order, not later than 10 years after the latest date on which a violation that gives rise to the claim occurs.”

The new law provides in section 21(d)(8)(C) that the time a defendant is outside of the United States does not count toward the expiration of the limitations period: “any time in which the person against which the action or claim, as applicable, is brought is outside of the United States shall not count towards the accrual of” the limitations period.

The legislation has two final provisions. One, which is to become section 21(d)(9), says that the addition of the disgorgement remedy in SEC cases may not “be construed as altering any right that any private party may have to maintain a suit for a violation of this Act.” In the last part of the new law, Congress specified that the new disgorgement statutes “shall apply with respect to any action or proceeding that is pending on, or commenced after, the date of enactment of this Act,” which was January 1, 2021.

III. THE NEW SEC DISGORGEMENT STATUTE AND LIU’S EQUITY APPROACH

One important question about the new disgorgement statute is whether disgorgement based on the law must meet the three equitable limitations Liu found necessary for equitable disgorgement. Did Congress want the disgorgement remedy, as authorized in the new legislation, to adopt and incorporate the Liu analysis and the features of disgorgement in traditional equity or restitution practice as described in the opinion? Alternatively, did Congress

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61 Id. § 78u(d)(8)(C).
62 Id. § 78u(d)(9). This language duplicates language in Senate bill S. 799, introduced in March 2019 to overturn Kokesh. S. 799, 116th Cong. § 2 (2019).
63 NDAA § 6501(b), 134 Stat. at 4626.
mean to pick up the ways courts were applying disgorgement in SEC enforcement cases before Liu, including the practices that the Kokesh Court found making disgorgement in SEC cases a penalty? Or was Congress writing on a fresh slate?

Courts and lawyers in SEC enforcement cases will confront these questions and standard methods of statutory interpretation should provide answers. The goal of statutory interpretation is to enforce a decision attributable to the legislature and do what the legislature wanted, without exceeding what the text will bear. That goal rests on democratic values, the system of government established in the Constitution, the direct election of members of Congress and the election of the President, and the role of Congress and the President in enacting laws. Judges implement statutes that embody policies selected by Congress, not their own personal policy preferences. The principle of legislative supremacy guides statutory interpretation and a connection to the legislative process provides legitimacy to a court’s interpretation.

Courts usually take three steps to determine the will of Congress. First, they look at the text, context, and structure of

69 See Scalia & Garner, supra note 67, at 345 (stating in a republic, a judge should follow the legislature and not his or her own rule).
70 See Jesse M. Cross & Abbe R. Gluck, The Congressional Bureaucracy, 168 U. Pa. L. Rev. 1541, 1637 (2020) (“[M]odern judges have never been willing to assert the mantle of being anything other than ‘faithful agents’ of Congress with their work tethered to the principle of legislative supremacy.”); see also Manning & Stephenson, supra note 65, at 25.
71 See Cross & Gluck, supra note 70, at 1682.
the statute.\textsuperscript{73} Second, they consider legislative history.\textsuperscript{74} Finally, if questions about meaning remain, they resort to other standard interpretive approaches, such as the Supreme Court’s use of rules and canons of construction.\textsuperscript{75} Applying this three-step methodology is the way to look for answers to the core question of whether the new disgorgement statute incorporates Liu’s reasoning and conclusions.

\textbf{A. Text}

The text of the new SEC disgorgement statute uses the terms “disgorgement” and “unjust enrichment.” It includes a general definition of disgorgement: “unjust enrichment by the person who received such unjust enrichment as a result of” the violation of the securities law the defendant committed.\textsuperscript{76} The definition states a narrower version of one of the limitations in Liu, as discussed later,\textsuperscript{77} but the text of the new statute does not reflect the analysis in Liu or its equity approach.

Although the Supreme Court usually interprets a statute according to the text’s ordinary public meaning, it is not likely to do so with the new disgorgement statute. Disgorgement has an ordinary public meaning,\textsuperscript{78} but Congress used that word and the

\begin{footnotes}
\item[73] See \textit{id.} at 6.
\item[74] See \textit{id.} at 9–10.
\item[77] See infra text accompanying notes 280–83.
\item[78] The Supreme Court “normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.” \textit{Bostock v. Clayton County}, 140 S. Ct. 1731, 1738 (2020); \textit{id.} at 1755 (Alito, J., dissenting); \textit{id.} at 1825 (Kavanaugh, J., dissenting). The new disgorgement statute was enacted in early 2021, making online dictionaries a valuable source for ordinary public meanings. Online dictionaries define disgorgement as the act of disgorging, and the verb disgorge as to vomit, expel, discharge or pour forth contents, give up something against one’s will, or surrender stolen goods or money unwillingly. \textit{See Disgorge}, \textit{YourDictionary}, \url{https://www.yourdictionary.com/disgorge}; \textit{Disgorgement}, \textit{The Free Dictionary}, \url{https://www.thefreedictionary.com/disgorgement}. The last definition is close to the legal definition and seems less of an ordinary public meaning. The two online dictionaries give legal definitions
\end{footnotes}
term “unjust enrichment” as a form of relief ordered by a court in litigation rather than in the way the words would be used in normal discourse. The legislation responded to controversies about disgorgement orders in SEC enforcement cases, and the new statute fits into section 21(d) of the Exchange Act, which has a list of other remedies a federal court may order in SEC enforcement cases. Unjust enrichment is also “a term of art.” Within the law of restitution, the phrase identifies those forms of enrichment creating legal liability.

Although the terms “disgorgement” and “unjust enrichment” in the new SEC disgorgement statute have a legal meaning, two textual considerations arise. One is whether the meanings of the terms imply the equitable limitations in Liu, and the other concerns the possible signal from the placement of the new statute in the U.S. Code.

1. The Possible Implication of the Liu Equitable Limitations from the Terms “Disgorgement” and “Unjust Enrichment”

The terms “disgorgement” and “unjust enrichment” in the new SEC disgorgement statute do not carry with them any intrinsic implication that makes them equitable or limits them in the way Liu described. If they did, Liu, and probably Kokesh, would not have been necessary. The terms may be interpreted in other ways.

Disgorgement, which is a measure for restitution, as well as restitution more generally and unjust enrichment, are not inherently equitable. The Supreme Court stated that “restitution

for unjust enrichment. See also Kevin Tobia et al., Ordinary Meaning and Ordinary People, 171 U. Pa. L. Rev. 365, 367, 372 (2023) (discussing studies that show that ordinary people understand law to communicate technical legal meanings).

See SEC v. Hallam, 42 F.4th 316, 339 (5th Cir. 2022) (“[W]e consider ‘disgorgement’ as a ‘legal term of art,’ not in its ordinary sense, because it is an undefined statutory term that had an established legal meaning by 2021.”).


Restatement (Third) of Restitution and Unjust Enrichment § 1, cmt. b at 4 (Am. L. Inst. 2011) [hereinafter Restatement].

Id. § 51, cmt. a (“Restitution measured by the defendant’s wrongful gain is frequently called ‘disgorgement.’”).

See id. § 4, cmt. a.
was available in certain cases at law and in certain others in equity.”84 The Restatement (Third) of Restitution and Unjust Enrichment concluded that “[l]iabilities and remedies within the law of restitution and unjust enrichment may have originated in law, in equity, or in a combination of the two.”85 It alerted readers “that modern restitution is difficult to characterize in law/equity terms” and warned “against the common misconception that liabilities or remedies described in terms of ‘unjust enrichment’ are necessarily equitable in origin.”86 “The law of restitution is not easily characterized as legal or equitable because it acquired its modern contours as the result of an explicit amalgamation of rights and remedies drawn from both systems.”87

Early equity practice did not use the word disgorgement. It is a modern term.88

The practice of the SEC and courts before Kokesh and Liu shows that the terms “disgorgement” and “unjust enrichment” could be applied to amounts larger than those Liu would permit. The SEC had developed, and courts had approved, a type of disgorgement in SEC enforcement cases that did not conform with the equitable principles in Liu. Kokesh found that SEC disgorgement was not compensatory because courts had discretion to pay the disgorgement amount to the U.S. Treasury or to injured investors.89 SEC disgorgement sometimes ignored a defendant’s expenses or exceeded the profits gained from a violation.90 The Liu case concerned a disgorgement order claimed to exceed the defendant’s net profits from wrongdoing after deductions for legitimate expenses.91 The Liu Court said:

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85 Restatement § 4(1).
86 Id. § 4, cmt. a.
87 Id. § 4, cmt. b.
88 Liu v. SEC, 140 S. Ct. 1936, 1940 n.1 (2020) (acknowledging “the relatively recent vintage of the term ‘disgorgement’”). Justice Thomas went further in Liu and argued that “disgorgement is not a traditional equitable remedy,” “is a creation of the 20th century,” and “is a word with no fixed meaning.” Id. at 1950, 1953 (Thomas, J., dissenting).
90 See id. at 466.
91 Liu, 140 S. Ct. at 1942, 1950.
Over the years, however, courts have occasionally awarded disgorgement in three main ways that test the bounds of equity practice: by ordering the proceeds of fraud to be deposited in Treasury funds instead of disbursing them to victims, imposing joint-and-several disgorgement liability, and declining to deduct even legitimate expenses from the receipts of fraud. The SEC’s disgorgement remedy in such incarnations is in considerable tension with equity practices.92

As a result, the terms “disgorgement” and “unjust enrichment”—on their own and without additional guidance from Congress—do not imply that they are equitable.93 The words do not tie the remedy to equitable principles.94 A reasonable reader of the new disgorgement statute is not confined to an understanding that disgorgement must satisfy the three equitable principles in Liu.

2. The Separation of Disgorgement from Equitable Relief

We should also consider other text in the new statute and its structure and placement. Congress separated disgorgement from equitable relief, which could mean that Congress rejected the equitable limitations that the Supreme Court applied in Liu.

Congress separated disgorgement from equitable relief in two ways. First, it added disgorgement to the section 21(d) list of types of relief available in SEC cases in federal court95 and did

92 See id. at 1946.
93 See discussion infra Section III.B.
95 Members of Congress voted on the placement of the new disgorgement statute. The public law version of the new disgorgement statute, which is the text Congress enacted, explicitly amended section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d). That is likely where the new statute will appear in the U.S. Code, although a staff unit of Congress, the Office of the Law Revision Counsel, has discretion to organize, rearrange, and place material from public laws into the U.S. Code. See Cross & Gluck, supra note 70, at 1554, 1567–73, 1662, 1664, 1680.
not connect disgorgement with the existing provision in section 21(d)(5) that authorizes federal courts to grant “any equitable relief that may be appropriate or necessary for the benefit of investors.”96 Section 21(d)(5) was the statute the Liu Court construed to find authority for disgorgement.97 Congress did not alter section 21(d)(5) in any way.98 If Congress had amended the provision on equitable relief to say “including disgorgement,” the legislation more easily could be seen to have adopted the Court’s analysis in Liu.99

Second, Congress added separate limitations periods for disgorgement and equitable remedies. Disgorgement has five- and ten-year periods in section 21(d)(8)(A).100 A “claim for any equitable remedy, including for an injunction or for a bar, suspension, or cease and desist order,” has a ten-year period in section 21(d)(8)(B).101

Is the separation of disgorgement from equitable relief meaningful? Does it mean Congress did not classify disgorgement as equitable relief? Does it mean Congress did not accept the equitable limitations on disgorgement that the Supreme Court applied in Liu? The text, structure, and context of the new statute do not answer these questions. They do not say disgorgement is or is not an equitable remedy.102 All Congress did was give disgorgement its own statutory provision as a remedy with its own statute of limitations scheme.103

The origin of the new statute explains the separate provisions on disgorgement. The legislative history discussed below shows that Congress’s goal was to address the two main issues from Kokesh: the question of the authority of courts to award

97 Liu v. SEC, 140 S. Ct. 1936, 1940 (2020)
99 Congress added such language to the Commodity Exchange Act in 2010. It gave courts power to impose “equitable remedies including . . . disgorgement of gains” in cases brought by the Commodity Futures Trading Commission. 7 U.S.C. § 13a-1(d)(3)(B).
101 Id. § 78u(d)(8)(B).
102 See id. § 78u(d)(7)–(8).
103 See id.
disgorgement and the application of the five-year statute of limitations. The new statute directly addresses those two issues, which likely explains why the new statute has specific provisions on disgorgement separated from other remedies. The failure of the final enactment or even some legislative history to contain explicit language one way or the other about disgorgement as equitable relief or the equitable limitations described in Liu leaves Congress’s desires on those issues uncertain.

Limiting the analysis to text, structure, and context does not produce convincing evidence that Congress wanted disgorgement to adopt or reject the outcomes and reasoning in Liu. No inference from the text or the structural separation in the statute of disgorgement from other equitable remedies is strong. A Congress desirous of approving Liu had direct and plain ways of doing so. It could have categorized disgorgement as equitable, but it did not. It could have added statutory text on “net profits” and payment to victims, but it did not. Without strong interpretive guidance from the text, the search for Congress’s will on the relationship between Liu and the new disgorgement statute needs to turn to legislative history.

B. Legislative History

The legislative history of the new SEC disgorgement statute involves three different stages. One is whether the passage of the statute shortly after the Liu decision meant that Congress

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104 See discussion infra Section III.B; see also Kokesh v. SEC, 581 U.S. 457, 461 n.3 (2017).
adopted the Liu equitable limitations. The second is the legislative record of the 2021 National Defense Authorization Act (NDAA). The third looks at legislative efforts before Liu and the NDAA to give federal courts authority to order disgorgement in SEC enforcement cases. Ultimately, none of this legislative history provides a solid ground for concluding that Congress incorporated Liu into the new statute.

1. The Enactment of the New Statute Close in Time to the Liu Decision

Some argue that Congress’s use of the word “disgorgement” should be understood to have adopted the meaning of “disgorgement” in Liu because of the closeness in time between the Liu decision and the enactment of the new SEC disgorgement statute. The Supreme Court decided Liu in June 2020, and Congress developed the language for the new disgorgement statute in December 2020 during the conference committee’s work on the NDAA. On this view, the timing implies that Congress must have had the Liu decision in mind when it decided on the new statute. The Supreme Court generally assumes that when Congress enacts statutes, it is aware of the Court’s relevant precedents. Perhaps Members of Congress or their staff had the Liu decision in mind, but neither the assumption nor the timing tells us whether Congress approved or disapproved of Liu. Some might reasonably conclude that the closeness in time indicates that Congress disagreed with the Court in Liu and wanted disgorgement to have a different meaning. Liu had fully responded to

107 Levintow, supra note 94.
110 See infra text accompanying notes 136–38.
111 See Hallam, 42 F.4th at 341 (reasoning that, on the presumption that Congress was aware of Liu, the decision to amend the statute six months later on the same subject was not likely to be agreement and that such “swift,
Kokesh by finding that the securities laws permitted federal courts to order disgorgement in an SEC case, as long as the order met certain conditions, and by implying that the five-year statute of limitations did not apply to disgorgement qualifying as equitable. A disgorgement statute was not necessary if the objective was to correct Kokesh, but Congress proceeded to cover the Kokesh issues with the new statute. Others might reasonably argue that the closeness in time indicates that Congress wanted to ratify and adopt the Court’s approach.112

In the end, the short period of time between Liu and the disgorgement statute’s enactment does not alone provide sufficient information about the status of the Liu principles in the new law. Without more, the timing is ambiguous. It raises but does not answer the question about Congress’s adoption of the Liu principles in the new disgorgement statute.

2. Legislative Responses to Kokesh


112 See Levintow, supra note 94.


wanted a statute explicitly authorizing the SEC’s ability to obtain disgorgement in a federal court case, and it wanted relief from the five-year limitations period.\(^{115}\)

In response to *Kokesh*, the House and the Senate considered various bills in 2018 and 2019. My opinion was that the early legislative proposals had serious problems.\(^{116}\) The House passed one bill, H.R. 4344, in November 2019, addressing these issues.\(^{117}\) At that time, the Supreme Court had just granted review in *Liu*,\(^{118}\) so the case had not yet been briefed or decided. Another bill, S. 799, was introduced in the Senate in March 2019 and was referred to committee, but no subsequent action occurred.\(^{119}\) The Senate did not pass H.R. 4344.\(^{120}\)


The legislative efforts on SEC disgorgement authority appeared to be at an end until they resurfaced in the final stages of work on the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021. The bill to authorize appropriations for military activities was introduced in the House in

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\(^{115}\) *See Oversight House Hearing*, supra note 114, at 66.


\(^{118}\) *Liu v. SEC*, 140 S. Ct. 451 (Nov. 1, 2019), *cert. granted* (No. 18-1501).


March 2020. The House and Senate passed different versions and formed a conference committee to resolve the differences. The committee issued a conference report on December 3, 2020. Both chambers passed the conference version, but the President vetoed it. Congress overrode the veto, and the bill became law on January 1, 2021.

The SEC disgorgement legislation played no role in the NDAA until the disgorgement language emerged fully formed in the December 2020 conference report. The language first became public in the bill text at the beginning of the report, although it drew no attention and was not explained. Besides the proposed statutory text, nothing in the conference report mentioned the SEC disgorgement provision, equity, Kokesh, or Liu.

The Members of Congress did not mention the disgorgement language, equity, Kokesh, or Liu on the floor of the House or Senate at the time the chambers passed the conference version or overrode the presidential veto. The Congressional Record entries about the NDAA at those times did not refer to SEC disgorgement.

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122 See id.


During the House debate on the military funding bill after the conference, one Member made a floor statement about several pieces of financial services legislation included in the bill, possibly alluding to the section on SEC disgorgement.\textsuperscript{129}

The legislative process for the NDAA produced no public words about SEC disgorgement authority except the new statutory language and this one possible vague reference in a short floor statement.\textsuperscript{130} It did not mention the final decision in \textit{Liu} and therefore contained no hint whether Congress approved or disapproved. Why did Congress not provide better guidance about the \textit{Liu} factors? The materials available to the public do not say.

One person familiar with the inclusion of the disgorgement language in the work of the conference committee provided a tantalizing tidbit. That person, who did not want to be identified publicly, informed me that congressional personnel watched the \textit{Liu} case and that some language in the bill was changed after the \textit{Liu} decision, but the person was not able to recall further details.\textsuperscript{131} Efforts to obtain additional information from other sources were not successful. As a result, courts and lawyers must interpret the new statute based on the narrow statutory text and limited legislative record of the NDAA, which does not refer to \textit{Liu} and does not reveal the influence of the decision on Congress's ultimate legislation.\textsuperscript{132}

\textit{4. The House Predecessor to the New Disgorgement Statute}

Only one further pronouncement from Congress sheds any light on the new SEC disgorgement statute. On the day of the conference report, Maxine Waters, the Chairwoman of the House Financial Services Committee, issued a press release to tout the

\begin{thebibliography}{9}
\bibitem{129} 166 \textsc{Cong. Rec.} H6907 (daily ed. Dec. 8, 2020) (statement of Rep. Maxine Waters), at H6926 (referring to “10 measures authored by Democratic members of the Financial Services Committee within the NDAA. These bills would help to protect the U.S. financial system [and] provide more remedies to investors who were deceived by corporate wrongdoers . . . .”); see Russ Ryan et al., \textit{Unpacking the SEC’s New Disgorgement Powers}, 22 \textit{J. Inv. Compliance} 180, 182 (2021).
\bibitem{130} See \textit{Surprise Year-End SEC Disgorgement Legislation}, supra note 128.
\bibitem{131} Telephone interview with a person familiar with the matter (Dec. 2, 2022).
\bibitem{132} See \textit{Surprise Year-End SEC Disgorgement Legislation}, supra note 128.
\end{thebibliography}
financial services legislation she was able to include in the NDAA: “I am very pleased to have secured the inclusion of important Democratic financial services legislation in the NDAA.”133 One of the bills she listed was “H.R. 4344, as amended in conference, legislation by Representative Ben McAdams (D-UT) to enhance the Securities and Exchange Commission’s tools to recover the ill-gotten gains of bad actors and return them to investors.”134 H.R. 4344, which was one of the bills introduced in Congress to respond to Kokesh, was passed by the House in November 2019 but was not passed by the Senate.135 The Chairwoman was the same Member who made the floor statement about House financial services legislation included in the NDAA, but the press release had more detail.136

On its face, the press release from the Chairwoman connects the final statutory language in the NDAA with the House’s work to pass H.R. 4344. That connection provides context about the new disgorgement statute, but it does not bear much weight.137 The source is only a press release from one Member of Congress seeking attention for Democratic financial services legislation from the House. It is not formal legislative material representing a consensus of drafters of the statute. In any event, an examination of the background of H.R. 4344 offers no answers about the role of the Liu equitable principles in the new disgorgement statute.

Two facts prevent H.R. 4344 from being helpful about the effect of the Liu analysis on the disgorgement statute. First, the House passed it before the Supreme Court decided Liu. The House passed H.R. 4344 in November 2019.138 The Court had only


\[\text{134} \] Id.

\[\text{135} \] See supra notes 122–124 and accompanying text.


recently granted review in *Liu*,\(^\text{139}\) as noted in statements in the Congressional Record characterizing the case as addressing whether federal courts could grant disgorgement in SEC actions.\(^\text{140}\) The Supreme Court did not issue the *Liu* opinion until June 2020.\(^\text{141}\) The objective of H.R. 4344 was to respond to *Kokesh*.\(^\text{142}\)

Second, the final text of the new SEC disgorgement statute is significantly different from H.R. 4344.\(^\text{143}\) Important phrases in the 2021 legislation came from S. 799, the Senate bill separately introduced in March 2019.\(^\text{144}\) The claim in the press release that the Defense Authorization Act included H.R. 4344 is an exaggeration, saved only by the qualification that the conference “amended” the bill.\(^\text{145}\)

H.R. 4344 and the final text of the new statute have two similarities. They both explicitly authorize federal courts to enter


\(^{141}\) *See Liu*, 140 S. Ct. 1936.

\(^{142}\) One of the two main sponsors of H.R. 4344, Benjamin McAdams of Utah, explained the bill on the day the House passed it in November 2019:

> This legislation would reverse the *Kokesh* decision, specifically authorize disgorgement as a remedy that the SEC can seek, and give the SEC up to 14 years to seek disgorgement of ill-gotten gains. So, in essence, this legislation seeks to fix the *Kokesh* decision and would address the recent case the Supreme Court agreed to hear about whether the SEC has disgorgement authority at all [referring to the *Liu* case].

116 CONG. REC., *supra* note 140, at H8929, H8931–32 (discussing H.R. 4344). The Congressional Record included a letter from the SEC Chairman to House leaders that supported H.R. 4344 and requested that Congress remove any uncertainty about the SEC’s ability to obtain disgorgement in federal court and extend the statute of limitations for disgorgement. *Id.* at H8931–32.


\(^{144}\) *Compare* NDAA § 6501, 134 Stat. at 4625, *with* S. 799, 116th Cong. (2019); *see also* Ryan et al., *supra* note 129.

\(^{145}\) *See* Waters Press Release, *supra* note 133.
disgorgement orders in SEC cases and extend the statute of limitations for the disgorgement remedy.\textsuperscript{146} Otherwise, many differences exist. H.R. 4344 referred to: “Disgorgement 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.”\textsuperscript{147} The new statute refers to disgorgement “of any unjust enrichment by the person who received such unjust enrichment as a result of such violation,”\textsuperscript{148} which is language similar to a provision in S. 799.\textsuperscript{149} The new statute limits recovery to an amount a specific defendant “received” from a “violation” rather than an amount resulting from an act or practice the SEC alleged to be a violation. The statute of limitations for disgorgement in H.R. 4344 was 14 years;\textsuperscript{150} the new statute has 5- and 10-year limitations periods depending on whether a violation has a scienter requirement.\textsuperscript{151} H.R. 4344 applied the 14-year period to injunctions and officer and director bars;\textsuperscript{152} the new statute uses language from S. 799 and applies a 10-year period to “a claim for any equitable remedy, including for an injunction or for a bar, suspension, or cease and desist order.”\textsuperscript{153} H.R. 4344 required a report from the SEC about its enforcement actions after 10 years;\textsuperscript{154} the new statute does not require a report. Further differences exist.

In the end, the House’s work on H.R. 4344 has limited utility for ascertaining the desire of Congress to incorporate Liu’s equitable principles in the final statutory text of the disgorgement statute. The House passed H.R. 4344 before the Court decided Liu,

\textsuperscript{154} See H.R. 4344, 116th Cong. § 2(c) (2019).
and the House bill and the final statute have different language. The principal effect of the connection to H.R. 4344 might be to show that responding to *Kokesh*, which was the aim of H.R. 4344 and S. 799, took precedence over responding to *Liu*. The main features of the new disgorgement statute, H.R. 4344, and S. 799 dealt with issues from *Kokesh*, statutory authorization and a statute of limitations for SEC cases in federal court seeking disgorgement. Materials about the NDAA and the press release from the Chairwoman of the House Financial Services Committee did not mention the *Liu* decision or equitable doctrines.  

5. Comments on Payment of Disgorgement to Injured Investors

One further aspect of H.R. 4344 warrants discussion. Statements supporting H.R. 4344 from some members of Congress referred to the payment of disgorgement amounts to victims of securities violations. The comments could be used to argue that Congress intended to oblige courts to disburse disgorgement to injured investors, which would be consistent with one of the equitable principles in *Liu*: “The equitable nature of [disgorgement] generally requires the SEC to return a defendant’s gains to wronged investors for their benefit.” Drawing that conclusion would read too much into the congressional statements.

On the day the House passed H.R. 4344, it held a debate on the floor about the legislation. A sponsor of the bill, the two floor managers, and the chair and ranking member of the relevant subcommittee spoke. Several connected disgorgement with the return of funds to victims. Al Green of Texas said the bill would ensure the “SEC has the tools it needs to hold bad

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155 See Waters Press Release, *supra* note 133.
actors accountable and to return funds to harmed investors.”\textsuperscript{160} Ben McAdams of Utah described the amounts of disgorgement that the SEC could not recover because of \textit{Kokesh} as “ill-gotten gains that bad actors can now keep that don’t get returned to investors.”\textsuperscript{161} A letter from the SEC Chairman entered into the Congressional Record had similar passages, such as the one welcoming the opportunity to work with Congress on H.R. 4344 “to ensure defrauded retail investors can get their investment dollars back.”\textsuperscript{162}

These statements can easily be misread and need to be understood against the law and practice on SEC disgorgement at the time. H.R. 4344 had no statutory text affecting the use of recovered disgorgement amounts,\textsuperscript{163} and the law at the time did not, and still does not, oblige courts or the SEC to pay disgorgement to investors.

In \textit{Kokesh} and \textit{Liu}, the Supreme Court reviewed the issue of the payment of disgorgement to injured investors. The \textit{Kokesh} Court explained that a district court had discretion to determine how and to whom disgorged funds would be distributed in an SEC enforcement case.\textsuperscript{164} “Even though district courts may distribute the funds to the victims, they have not identified any statutory command that they do so.”\textsuperscript{165} “Some disgorged funds are paid to victims; other funds are dispersed to the United States Treasury.”\textsuperscript{166} Statutory provisions from 2010 creating an investor protection fund took into account that a disgorgement recovery might not be paid to victims.\textsuperscript{167} That is still the state of the law.\textsuperscript{168}

\begin{footnotes}
\textsuperscript{160} 116 CONG. REC. H8930 (daily ed. Nov. 18, 2019).
\textsuperscript{161} Id.
\textsuperscript{162} Id. at H8932 (discussing the letter from Jay Clayton, Chairman of the Securities and Exchange Commission, to the Speaker and Republican Leader of the House of Representatives).
\textsuperscript{163} See H.R. 4344, 116th Cong. § 2(a) (2019).
\textsuperscript{165} Id.
\textsuperscript{166} Id.; see also \textit{Liu} v. SEC, 140 S. Ct. 1936, 1947 (2020).
\textsuperscript{167} 15 U.S.C. § 78u-6(g)(3)(A)(i) (2021) (providing that the fund is to receive any monetary sanction collected by the SEC that is not added to a disgorgement or distribution fund or is not “otherwise distributed to victims of a violation of the securities laws”). This provision should have weight in interpreting the new disgorgement statute. \textit{See infra} notes 300–02 and accompanying text.
\textsuperscript{168} See NDAA § 6501 (containing no provision that requires disgorgement to be returned to victims); \textit{Liu}, 140 S. Ct. at 1942, 1947–48.
\end{footnotes}
Although the law does not require disgorgement to be paid to injured investors, the SEC’s preference is to have courts distribute disgorgement amounts to victims of the securities violation when that is feasible. The SEC has explained to courts that its policy is to recommend a distribution plan to pay a defendant’s unlawful gains to defrauded investors whenever possible, but that is not always practicable.169 The statements from Members of Congress saying that H.R. 4344 would help to return funds to harmed investors were based on the SEC’s preference for returning recovered disgorgement to investors and the concern that Kokesh was reducing the amount of disgorgement that could be collected and returned. The point of the members’ comments was that H.R. 4344 would increase disgorgement recoveries and put the SEC in the position of paying them to victims when possible. The comments did not mean that H.R. 4344 contained any statutory text to change existing law and practice by requiring the SEC or courts to return disgorgement payments in SEC cases to injured investors. The bill did not have such text.170

The text and legislative history of the new disgorgement statute do not reveal sufficient grounds for concluding that Congress adopted the Liu equitable limitations on disgorgement. That leaves judicially created rules or canons of statutory interpretation to consider.

C. Canons of Statutory Construction

Courts and legal advisers generally turn to a few other sources of interpretive assistance when the text and legislative history do not provide a confident answer.171 They look for guidance in the decisions of appellate courts, mainly the Supreme Court, and particularly from certain interpretive rules known as canons of construction.172

169 SEC v. Fischbach Corp., 133 F.3d 170, 174 (2d Cir. 1997); see also U.S. Sec. & Exch. Comm’n, Division of Enforcement 2020 Annual Report 18 (2020) (“The Commission places a significant priority on returning funds to harmed investors whenever possible.”).
170 The letter from the SEC Chairman in the Congressional Record referred to the recovery of disgorgement “for possible distribution” to harmed investors. 116 CONG. REC. H8932 (daily ed. Nov. 18, 2019).
171 Gluck & Bressman, supra note 159, at 924.
172 Id.; Gluck & Posner, supra note 15, at 1301.
Many canons or presumptions of statutory interpretation exist. There are different categories and types. Some restate linguistic and grammar rules, such as the presumption that a limiting clause at the end of a list of terms or phrases modifies only the last noun or phrase rather than all the elements of the series. Some rest on important substantive policies, such as the rule of lenity or the presumption against pre-empting state law.

To a large extent, canons are meant to help courts determine the meaning of statutory text when it is ambiguous or other methods of interpretation do not resolve the question in a case. The commitment to legislative supremacy that guides statutory interpretation carries over to the use of the canons considered here (but not all canons). In a general, imperfect, and sometimes indirect way, the canons of construction discussed below help interpreters grasp what the enacting legislature wanted the statutory language to mean. To meet this goal, a canon needs to reflect and correspond to the way Congress actually works when passing laws.

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174 See MANNING & STEPHENSON, supra note 65, at 324, 327; NELSON, supra note 137, at 82–83.

175 See Lockhart v. United States, 577 U.S. 347, 349 (2016) (applying the rule of the last antecedent, and not the series-qualifier principle, to the phrase “the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward” and holding that “involving a minor or ward” modified only “abusive sexual conduct” and not the other state offenses).


177 MANNING & STEPHENSON, supra note 65, at 324.

178 See supra text accompanying notes 65–70; Barrett, supra note 68.

179 NELSON, supra note 137, at 82–83; see also MANNING & STEPHENSON, supra note 65, at 197, 272–73; Barret, supra note 68, at 117 (noting the purpose of linguistic canons “is to decipher the legislature’s intent”).

Canons of construction have been heavily criticized and should be used with care.\textsuperscript{181} They operate absent other, stronger evidence of Congress’s meaning.\textsuperscript{182} Canons do not override text, context, structure, or other sound guidance of the meaning of statutory words.\textsuperscript{183} Canons of interpretation are not rigid or absolute and may be overcome by the strength of interpretive indications that point in other directions.\textsuperscript{184} The Supreme Court said this about one of the canons discussed below, the canon on consistent construction:

The presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent . . . . It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance.\textsuperscript{185}

Several canons of construction appear on their face to be helpful in deciding whether the new SEC disgorgement statute adopted the equity analysis of disgorgement in \textit{Liu}. One is from

\textsuperscript{181} Nina A. Mendelson, \textit{Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade}, 117 MICH. L. REV. 71, 76 (2018) (stating that judicial reliance on canons has “drawn its own share of blistering criticism as capricious and potentially manipulative”); Gluck, \textit{supra} note 180, at 198 (“[T]he numerosity and malle-ability of the canons have led to a never-ending chorus of criticism that the Court uses them politically and unpredictably.”); Anita S. Krishnakumar, \textit{Reconsidering Substantive Canons}, 84 U. CHI. L. REV. 825, 827–28 (2017) (“Scholars have pointed out that substantive canons are counter-majoritarian, subject to judicial invention and reinvention, and difficult for Congress to overcome.”); Gluck & Bressman, \textit{supra} note 159, at 925 (“Commentators have offered multiple justifications for each type of canon and, with each justification, a different take on the courts-Congress relationship.”); \textit{id}. at 940 (“[Substantive] canons are infamously conflicting, overlapping, and manipulable.”); Richard A. Posner, \textit{Statutory Interpretation—in the Classroom and in the Courtroom}, 50 U. CHI. L. REV. 800, 806, 816 (1983) (commenting that most canons are wrong, vacuous, and inconsistent).

\textsuperscript{182} Krishnakumar, \textit{supra} note 181, at 827–28.

\textsuperscript{183} Eskridge & Frickey, \textit{supra} note 173, at 28, 30, 101.

\textsuperscript{184} Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932).

\textsuperscript{185} \textit{id}.; see also SCALIA & GARNER, \textit{supra} note 67, at 170.
Liu itself and could be read to mean that disgorgement in the new statute includes equitable limitations. Several other canons would be relevant if Liu were an authoritative interpretation of disgorgement, but it is not. The canon of consistent construction also could be seen to be relevant, although, in the end, none of these canons provides a persuasive basis for concluding that the new statute incorporated the Liu Court’s approach.

1. Liu Presumption in Favor of Limitations Equity Typically Imposes

The place to begin is a presumption Liu applied to the meaning of disgorgement. A segment from the Liu majority opinion might answer the question of whether the Liu principles of equity apply to the new disgorgement statute.

In its brief to the Liu Court, the SEC described several SEC enforcement statutes Congress enacted from 1988 to 2010 using the word disgorgement or disgorged. The agency argued that the statutes showed that Congress intended for disgorgement to be an available remedy in SEC enforcement cases brought in federal court and part of permissible equitable relief under section 21(d)(5) in SEC cases in court. The SEC invoked the “prior-construction canon,” which states that if a statute uses a term that has received an authoritative construction by courts or a responsible administrative agency, the term should be understood in that way. The SEC pointed to the practice of federal courts awarding disgorgement.

In response, the Court dismissed the prior-construction canon because the scope of disgorgement was far from settled.

It continued:

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186 Brief for the Respondent at 13–21, Liu v. SEC, 140 S. Ct. 1936 (2020) (No. 18-1501). These statutes made the reasoning used by the Liu Court unnecessary. The Court did not need to evaluate whether disgorgement was an equitable remedy under section 21(d)(5) because Congress had enacted statutes leaving no reasonable doubt that it authorized federal courts to order disgorgement in SEC cases. For example, at the time of Liu, section 21(d)(4) referred to “funds disgorged as the result of an action brought by the Commission in Federal court.” 15 U.S.C. § 78u(d)(4).
188 Id. at 23–24.
189 Id.
190 Liu, 140 S. Ct. at 1947.
At bottom, even if Congress employed “disgorgement” as a shorthand to cross-reference [equitable relief permitted by section 21(d)(5)], it did not silently rewrite the scope of what the SEC could recover in a way that would contravene limitations embedded in the statute. After all, such “statutory reference[s]” to a remedy grounded in equity must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes. Accordingly, Congress’ own use of the term “disgorgement” in assorted statutes did not expand the contours of that term beyond . . . a limit established by longstanding principles of equity.191

The Court reasoned that “Congress does not enlarge the breadth of an equitable, profit-based remedy simply by using the term ‘disgorgement’ in various statutes.”192

Under this reasoning, the meaning of disgorgement in the new statute should be deemed to contain the limitations upon its availability that equity typically imposes. That would mean that disgorgement under the new statute would need to comply with the longstanding equitable principles identified in Liu. If the reasoning is accepted uncritically, that answers the central question of this Article about the relationship between the new disgorgement statute and Liu.

The passage in Liu about the meaning of disgorgement in statutes is not persuasive, however. Essential parts of the passage can be challenged, and for eight reasons, it should not be followed.

First, the presumption that all statutory references to disgorgement must incorporate the equitable principles outlined in Liu was not necessary to resolve the case and should have only a weak stare decisis effect.193 It was not the holding of the opinion, which was that disgorgement conforming to the equitable principles was equitable relief within the terms of section 21(d)(5).194

The Court referred to the presumption to respond to an argument from the SEC, and the entire discussion could be removed without changing the result or principal reasoning in Liu.195

191 Id. (some quotation marks and citation omitted).
192 Id.
194 Liu, 140 S. Ct. at 1940, 1942.
195 Id. at 1947.
Second, the Court was not correct in presuming that disgorgement was a remedy grounded in equity necessarily incorporating equitable limitations. As already discussed, the rules for restitution, unjust enrichment, and disgorgement, as developed in the United States since the early twentieth century, derive from both courts of law and equity.\textsuperscript{196} Moreover, all the justices agreed that disgorgement was a modern creation, not an ancient one from equity.\textsuperscript{197}

Third, the actual practice of the SEC and courts was further evidence that disgorgement did not necessarily incorporate equitable limitations. Key parts of both \textit{Kokesh} and \textit{Liu} documented how, for years, the SEC had sought and courts had approved types of disgorgement in SEC enforcement cases that did not conform with the equitable principles in \textit{Liu}.\textsuperscript{198} They did so at a time when securities statutes referring to disgorgement were in effect,\textsuperscript{199} but leading judicial decisions on disgorgement did not discuss equitable limitations emanating from the statutes.\textsuperscript{200}

Fourth, when Congress passed securities statutes referring to disgorgement from 1988 until 2010, it was aware that courts ordered disgorgement relief with features the \textit{Liu} Court later found inconsistent with the equitable limitations on disgorgement. A 1988 congressional committee report for an insider trading enactment referred favorably to disgorgement obliging a tipper to pay profits made by tippees.\textsuperscript{201} A 2010 statute provided for the possibility that a disgorged amount might not be distributed to victims.\textsuperscript{202} Thus, Congress was aware to some extent of the rules favorable to the SEC that courts had applied and did not refer to counteracting equitable limitations extracted in \textit{Liu}. The assumption that Congress meant to embed hoary equitable

\textsuperscript{196} \textit{See} discussion \textit{supra} Section III.A.1.
\textsuperscript{197} \textit{See} \textit{supra} note 88 and accompanying text.
\textsuperscript{198} \textit{See Liu}, 140 S. Ct. at 1946 ("[C]ourts have occasionally awarded disgorgement in three main ways that test the bounds of equity practice."); \textit{id.} ("[T]he \textit{Kokesh} Court evaluated a version of the SEC’s disgorgement remedy that seemed to exceed the bounds of traditional equitable principles.").
\textsuperscript{199} \textit{See id.} at 1946 n.3; \textit{Kokesh} v. SEC, 581 U.S. 455, 464–66 (2017).
\textsuperscript{200} \textit{See Kokesh}, 581 U.S. at 464–66.
\textsuperscript{201} H.R. REP. NO. 100-910, at 20 n.16 (1988).
limitations in the earlier statutes’ or the new statute’s use of the word disgorgement is not creditable.

Fifth, the majority in Liu did not analyze the text, context, or legislative history of the earlier disgorgement enactments to ascertain Congress’s meaning. The Court did not have an evidentiary basis for assuming that Congress preferred embedding the equitable limitations in the statutes rather than current SEC and judicial practice or some other definition of disgorgement. Even if, before Liu, Congress had wanted to embed equitable limitations in statutory uses of disgorgement, that did not mean Congress had the same goal in the new SEC disgorgement statute after Liu. As discussed, information about the new statute did not refer to equity or Liu.

Sixth, the Court cited no authority for the proposition that a statutory reference “to a remedy grounded in equity must, absent other indication, be deemed to contain the limitations on its availability that equity typically imposes.” As support, the Court cited a footnote in a 2002 precedent, but the footnote in the 2002 decision was about the classic form of equitable relief, an injunction, not all forms of equitable relief, and the need to confine the availability of an injunction in the ways equity had. Liu, therefore, did not cite a legal source saying that a statute referring to an equitable remedy presumably incorporated all the traditional limitations on the remedy.

Seventh, Congress could not have always used disgorgement in earlier statutes as a shorthand to refer to the phrase equitable relief in section 21(d)(5), as Liu claimed. Congress

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203 See Liu, 140 S. Ct. at 1950 (Thomas, J., dissenting) (finding that “no published case appears to have used the term ‘disgorgement’ to refer to equitable relief” and arguing that the majority should not have found disgorgement to be a traditional equitable remedy).

204 See id. at 1947.

205 See supra text accompanying notes 190–91.

206 See discussion supra Section III.B.


209 See Great-West Life, 534 U.S. at 211 n.1.

210 See Liu, 140 S. Ct. at 1947.
did not enact section 21(d)(5) until 2002,\(^\text{211}\) and two securities statutes using the word disgorgement or disgorge were passed before 2002.\(^\text{212}\)

Eighth, the Court’s reasoning on the meaning of disgorgement was not internally consistent. It rejected the prior-construction principle because the scope of disgorgement was not settled but then said that disgorgement must be deemed to contain the limitations upon its availability that equity typically imposes.\(^\text{213}\) The two statements from the Court are difficult to reconcile. Disgorgement cannot both lack a settled meaning and have limiting principles that are so well established that Congress must be deemed to have embedded them in statutes authorizing disgorgement.

For those reasons, the part of the Liu opinion concluding that a securities statute referring to disgorgement must incorporate traditional equitable limitations is not convincing, even though eight justices joined the opinion. This conclusion should not end the search for a satisfying method of determining whether disgorgement, as used in the new SEC disgorgement statute, adopts the equitable limitations from Liu. A more established canon of construction might be of more assistance.

2. Canons Based on an Authoritative Judicial Interpretation

Rejection of the Liu equitable remedy presumption is not the end of the canons of construction to consider. Several other canons might help to determine whether disgorgement, as used in the new SEC disgorgement statute, incorporates the equitable principles discussed in Liu. Five potentially relevant canons are variations on a theme: Congress adopts a pre-existing judicial construction of a word or phrase when it uses the word or phrase in a statute. The question is whether any of these canons create a reasonable presumption that Congress adopted the Liu definition of disgorgement in the new SEC disgorgement statute.


\(^{213}\) Liu, 140 S. Ct. at 1947.
The prior construction canon provides: “If a statute uses words or phrases that have already received authoritative construction by the jurisdiction’s court of last resort, . . . they are to be understood according to that construction.”214 In Liu, the Court rejected an SEC argument that invoked this canon based on the presence of the word disgorgement in several securities statutes.215 The argument here would be different. It would be that Liu itself was the authoritative construction of the statutory phrase disgorgement.

According to another canon, when a word or phrase has acquired a prior meaning in the law, Congress intended it to have the established meaning.216 In a 2019 decision, the Supreme Court referred to the longstanding interpretive principle that a statutory term transplanted from another legal source brings the traditional legal meaning, the old soil, with it.217

A narrower but similar canon is that a statute using a common-law term without defining it adopts the common-law meaning.218

214 SCALIA & GARNER, supra note 67, at 322.
215 See Liu, 140 S. Ct. at 1947.
216 NELSON, supra note 137, at 85–86.
217 Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019) (applying the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction in a case asserting that a party violated a bankruptcy court discharge order, which operates as an injunction); see also FAA v. Cooper, 566 U.S. 284, 292 (2012) (“[W]hen Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.”) (internal quotation marks omitted); Davis v. Mich. Dept. of Treasury, 489 U.S. 803, 813 (1989) (“When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts.”); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59 (1911) (“[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.”).
218 Neder v. United States, 527 U.S. 1, 21–23 (1999) (“Where Congress uses terms [mail, wire, and bank fraud] that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise
The re-enactment canon states that, when re-enacting a law, the legislature implicitly adopts a well-settled judicial or administrative interpretation of the law.219

A further interpretive rule is that when a statutory term has a settled judicial interpretation and Congress enacts legislation that uses or relates to the term, a court should not accept an alternative meaning for the term if, during the recent legislative deliberations, members of Congress did not express approval for the alternative interpretation of the term.220 The differing interpretation should not be accepted because Congress likely would have commented on such a significant change during the recent legislative process. The argument here is that Liu’s construction of disgorgement should apply unless Congress expressed approval for a different definition when enacting the SEC disgorgement statute. It is another form of the interpretive canon inferring that Congress agrees with a judicial construction when it has not subsequently overridden a court’s interpretation or expressed a disagreement.

The common thread through these canons is that a word or phrase in a statute has an authoritative, well-settled, or established legal meaning. Disgorgement after Liu appears to qualify

dictates, that Congress means to incorporate the established meaning of these terms.”) (internal quotation marks omitted); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992) (employee); Standard Oil Co. of N.J., 221 U.S. at 59 (“[W]here words are employed in a statute [antitrust act] which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense.”); see Scalia & Garner, supra 67, at 320; see also Eskridge & Frickey, supra note 173, at 107.

219 Re-enactment Canon, BLACK’S LAW DICTIONARY (11th ed. 2019); Nelson, supra note 137, at 478–85; see Eskridge & Frickey, supra note 173, at 100 (stating re-enactments are an application of the prior-construction canon); Scalia & Garner, supra note 67, at 322.

because the Supreme Court looked carefully at aspects of disgorgement and reached certain conclusions.

On closer consideration, however, none of these canons help to resolve whether the new SEC disgorgement statute incorporates the *Liu* equitable limitations. The main reason is that *Liu* did not provide an authoritative construction of disgorgement for the securities laws. The question in *Liu* was not about the proper definition or meaning of disgorgement in the federal securities laws or federal law.\(^{221}\) The statute construed in *Liu* did not use the word disgorgement.\(^{222}\) The question in *Liu* was whether disgorgement, at least in some form, qualified as “equitable relief” under section 21(d)(5) of the Exchange Act.\(^{223}\) The answer was that, with appropriate limitations, disgorgement constituted equitable relief that federal courts were authorized to award in SEC cases under section 21(d)(5).\(^{224}\)

*Liu* asserted that disgorgement had a settled meaning in equity that earlier securities statutes adopted when they used the term disgorgement,\(^ {225}\) but facts largely accepted in the opinion contradict that assertion. Disgorgement was a term of “relatively recent vintage,”\(^ {226}\) had been awarded in SEC cases in forms exceeding the equitable limitations for many years,\(^ {227}\) and did not have a settled meaning from 1988 through 2010 when Congress used the term in several securities statutes.\(^ {228}\) In an earlier decision, the Supreme Court had observed that disgorgement had

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\(^{221}\) *Liu* v. SEC, 140 S. Ct. 1936, 1940 (2020).

\(^{222}\) *Id.*

\(^{223}\) *Id.*

\(^{224}\) *Id.* at 1942–46.

\(^{225}\) *Id.* at 1947.

\(^{226}\) *Id.* at 1940 n.1.

\(^{227}\) *Liu*, 140 S. Ct. at 1946 (“[C]ourts have occasionally awarded disgorgement in three main ways that test the bounds of equity practice”).

\(^{228}\) *Id.* at 1947 (stating that the scope of disgorgement was far from settled at the time Congress passed earlier statutes); *see also* Kemp v. United States, 142 S. Ct. 1856, 1864 (2022) (stating that statutory language brings a prior interpretation with it “only when a term’s meaning was ‘well-settled’ before the transplantation”); Fogerty v. Fantasy, Inc., 510 U.S. 517, 531–33 (1994) (rejecting re-enactment argument because there was no settled interpretation of the relevant statute about which Congress could have been aware).
origins in both law and equity.\textsuperscript{229} Liu, therefore, does not demonstrate that the meaning of disgorgement was well-settled and does not support the use of canons that presume Congress preferred the limited equitable form of disgorgement discussed in Liu as opposed to other approaches when it passed the new disgorgement statute.\textsuperscript{230}

Another reason these canons are not helpful on the relationship between Liu and the SEC disgorgement statute is that they assume the conclusion. The canons postulate that Liu described a well-established meaning of disgorgement and that Congress accepted that meaning.\textsuperscript{231} As just discussed, Liu did not outline a well-established meaning of disgorgement. In addition, a judge or lawyer using one of these canons should have a credible basis to believe that, in some realistic sense, Congress knew of and accepted the well-established meaning of a term or phrase.\textsuperscript{232} Here, the public record has nothing to verify Congress was aware of, approved, or accepted the Liu decision at the time of enacting the disgorgement statute.\textsuperscript{233} Some canons, of course, harbor an air of artificiality, but applying the re-enactment or prior construction canon to the new disgorgement statute based on Liu would be complete fiction. If Congress had indicated approval or acceptance of Liu, that would be a reason for interpreting the SEC disgorgement statute as incorporating the decision’s equitable principles.

The re-enactment canon does not apply for a further reason. The new SEC disgorgement statute is not a re-enactment of the statute Liu construed. Liu interpreted “equitable relief” in

\textsuperscript{230} Liu, 140 S. Ct. at 1943.
\textsuperscript{231} Id. at 1946–47.
\textsuperscript{232} See United States v. Sheffield Bd. of Comm’rs, 435 U.S. 110, 134–35 (1978) (referring to the re-enactment canon and need for evidence that Congress agreed with a prior interpretation); Nelson, supra note 137, at 479–80 (explaining that, before treating a re-enactment as codifying a prior interpretation, courts frequently examine the record “for signs that members of the reenacting Congress knew about those glosses and viewed them favorably”); id. at 449 (referring to occasions in which internal legislative history, debates, or proposed legislation evidences Congress’s knowledge of an earlier Court decision).
\textsuperscript{233} See discussion supra Sections III.B.1 & 3.
section 21(d)(5) of the Exchange Act and the conditions in which disgorgement would qualify as equitable relief.

The canon relying on the absence of statements from members of Congress asserting a meaning of disgorgement different from Liu has other weaknesses and is not applied consistently.\textsuperscript{234} It seeks to take advantage of a type of congressional silence, but legislative silence or inaction is not a reliable guide to the meaning of a statute.\textsuperscript{235} One writer said taking Congress’s failure to comment on a supposed change in the law as evidence of a collective plan not to change the law “is an extraordinary inference.”\textsuperscript{236} These are reasons not to use canons based on pre-existing legal meanings to construe the new disgorgement statute to follow Liu’s equitable limitations. As discussed later, however, one of the canons mentioned above—the canon presuming that a statutory word with an established legal meaning should be construed in accordance with that meaning—is more generally germane.\textsuperscript{237} The new disgorgement statute uses the words disgorgement and unjust enrichment as legal terms for remedies in litigating SEC enforcement cases and reasonably could be presumed to incorporate features of the legal term disgorgement that are settled and established. One of the Liu principles—that disgorgement should

\textsuperscript{234} Krishnakumar, supra note 220, at 21–39.
\textsuperscript{235} See Johnson v. Transp. Agency, 480 U.S. 616, 629 n.7 (1987) (discussing the effect of a congressional failure to act); id. at 671–72 (Scalia, J., dissenting).
\textsuperscript{236} Krishnakumar, supra note 220, at 37. The reliance on congressional silence for this canon is similar to other canons, such as the re-enactment canon or the presumption that a failure of Congress to overrule an earlier judicial interpretation of a statute means that Congress agrees with the interpretation. See Nelson, supra note 137, at 448–54, 478–86. The Supreme Court has sometimes invoked congressional silence or inaction, but it also has been critical of the approach. Id. In one case, the Court questioned whether the failure of Congress to overturn a statutory precedent was a reason for the Court to follow the precedent and said it was impossible to assert with any degree of assurance that a congressional failure to act represents affirmative approval of a court interpretation. Congressional inaction is not persuasive because the inaction could be for reasons other than a decision to leave a court interpretation in place, such as higher legislative priorities or failure to reach agreement on a replacement. Cent. Bank of Denver, NA v. First Interstate Bank of Denver, NA, 511 U.S. 164, 186–87 (1994); Nelson, supra note 137, at 448–51.
\textsuperscript{237} See discussion infra Section IV.C.
not exceed the net profits from wrongdoing after deducting legitimate expenses—is such a feature.238

3. The Presumption of Consistent Usage

Another canon to consider is the presumption of consistent usage or the in pari materia rule—the same or similar terms in a statute or act should have the same meaning.239 Statutes dealing with the same subject should be interpreted harmoniously if possible.240 The canon is stronger when connections between one usage and another exist, such as usage in a single provision or the same cohesive public law enacted at the same time by the same legislature.241 Usage over time by different Congresses in amendments of the same act might implicate the canon but should be analyzed with greater care.242

Congress used the term disgorgement or disgorge in a series of securities statutes from 1988 to 2010 and then again in 2021, but none of the statutes defines disgorgement in detail.243


239 See Smith v. City of Jackson, Mississippi, 544 U.S. 228, 238 (2005) (authorizing disparate-impact claims for discrimination prohibited in second statute after Court authorized such claims for discrimination prohibited in first statute); Gustafson v. Alloy Co., 513 U.S. 561, 568 (1995) (adopting “the premise that the term [prospectus] should be construed, if possible, to give it a consistent meaning throughout the [Securities] Act”); Nelson, supra note 137, at 486–525; Gluck & Bressman, supra note 159, at 933, 936–37 (also calling the canon the whole act or whole code rule); Eskridge & Frickey, supra note 173, at 105.

240 Scalia & Garner, supra note 67, at 170; see also In Pari Materia, BLACK’S LAW DICTIONARY (11th ed. 2019) (statutes relating to the same matter “may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.”).

241 Scalia & Garner, supra note 67, at 173.

242 See id.; Nelson, supra note 137, at 487.

The definition in the new SEC disgorgement statute has the most detail; it defines disgorgement as “unjust enrichment by the person who received such unjust enrichment as a result of such violation.”

The canon of consistent usage is a basis for applying the 2021 general definition to all the uses of disgorgement in the securities statutes, absent persuasive evidence from Congress that one of the earlier uses had a different meaning. Similarly, the canon supports the sensible proposition that disgorgement as a form of relief in SEC enforcement cases should not have a different meaning in different provisions of the federal securities laws, again unless Congress gave a different direction.

The canon of consistent usage is not as helpful in deciding whether the new disgorgement statute and the preceding uses of disgorgement adopt the *Liu* equitable conception of disgorgement. An argument exists that a loose version of the canon applies, incorporating *Liu* into the meaning of disgorgement in the securities laws, but that argument is not strong.

The argument to apply the canon of consistent usage is that the Supreme Court considered and reached some conclusions about the features of disgorgement in *Liu*. For purposes of consistency, those features could apply to the term disgorgement in the new SEC disgorgement statute, as well as the use of the term in other earlier provisions of the securities laws.

That argument is plausible, but it suffers from several defects. Some of the considerations are similar to those discussed earlier. First, the Supreme Court has never directly decided the question of how to define the details of disgorgement as a term or form of relief in the securities statutes. The statute at issue in *Liu* did not use the word disgorgement. The question in *Liu* was whether, or under what circumstances, disgorgement was equitable relief under section 21(d)(5) of the Exchange Act. That issue guided the search for equitable limitations. The Court articulated an assumption that all uses of disgorgement in the

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245 See discussion supra Part I.
247 *Liu*, 140 S. Ct. at 1940.
248 See id. at 1946.
securities statutes must “be deemed to contain the limitations upon its availability that equity typically imposes,” but that assumption, as previously discussed, has problems.

Second, the canon of consistent usage does not always identify which of several possible meanings of a statutory term should be used. Liu is not the only source for a consistent definition of disgorgement, and the preference for a consistent meaning would not necessarily lead to the type of disgorgement described in Liu. The factors needed to qualify disgorgement as equitable are not necessarily the sole or better interpretation of disgorgement as used in the statutes.

Disgorgement has acceptable alternative interpretations. One reasonable alternative is that earlier uses of the word disgorgement in securities statutes from 1988 to 2010 referred to the way the SEC and courts were then enforcing disgorgement, which pre-existed and diverged from Liu’s equitable principles. Before the first statutory reference in 1988, courts ordered the disgorgement of profits that the defendant never received. At other times before the Liu decision, the SEC and courts awarded disgorgement in ways that tested the bounds of equity practice, such as imposing joint-and-several liability in various forms. A 2002 statute addressed court-ordered disgorgement in SEC cases, showing that Congress was aware and approved of disgorgement in federal courts. Already mentioned was the evidence that Congress was aware that courts ordered disgorgement in ways the Liu Court later found not to be consistent with its equitable limitations.

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249 Id. at 1947.
250 Supra notes 195–215 and accompanying text.
251 See also infra notes 321–31 and accompanying text for possible alternative interpretations of disgorgement.
252 See sources cited supra note 243 (listing securities statutes from 1988 to 2010 that used the term disgorgement).
253 See SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971) (upholding order that a tipper should pay the profits of tippees); see also infra text accompanying notes 290–91.
255 See infra note 280 and accompanying text.
257 See discussion supra Section III.B.5.
Defining disgorgement to reflect actual practice in the period up through *Kokesh* and *Liu* is a realistic alternative to the *Liu* interpretation, but that position would be complicated and create uncertainty. The definition would vary for the different statutes as courts altered their approach to disgorgement during the period Congress enacted further legislation referring to disgorgement and, therefore, would not advance the goal of the consistent usage canon.258

A third reason the canon on consistent usage is not an especially strong basis for incorporating the *Liu* factors into the new SEC disgorgement statute is the absence of a connection between *Liu* and the meaning Congress wanted. A canon of construction is more persuasive when it promotes legislative supremacy consistent with democratic values and constitutional processes.259 Nothing in the public record shows that Congress—relevant members or staff—approved of *Liu* when passing the new SEC disgorgement statute.260 In fact, the stronger evidence is that the legislation was to override *Kokesh*.261 Its usage in earlier statutes did not imply the limitations in *Liu*, and some materials from Congress during the period before *Liu* contradicted certain *Liu* factors.262 As a result, no positive evidence exists that Congress wanted the SEC disgorgement statute or the earlier statutory uses of disgorgement to adopt the principles in *Liu*.

Canons of construction, just as with the text and legislative history, do not provide a strong basis for concluding that the new SEC disgorgement statute incorporates the *Liu* decision and equitable principles. Some arguments for the adoption of *Liu* exist, such as the canon on consistent usage or the presumption in *Liu* that Congress’s use of the term disgorgement should be read to include the equitable limitations, but the arguments suffer from defects and are ultimately not persuasive.

The traditional methods of statutory interpretation do not demonstrate that Congress wanted the terms disgorgement and unjust enrichment in the new statute to be treated as equitable

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258 *See supra* notes 240–41 and accompanying text.
259 *See supra* notes 222–25 and accompanying text.
260 *See supra* notes 132–34 and accompanying text.
261 *Supra* note 144 and accompanying text.
262 *See discussion infra* Section IV.B.
remedies with the traditional equitable limitations the Court found in *Liu*. Courts, the SEC, and legal advisers should resist any temptation to read into the statute words or concepts that are not there.263

**D. Judicial Interpretations of Liu’s Effect on the New Disgorgement Statute**

Several appellate judges have considered the relationship between *Liu* and the new disgorgement statute.264 The paragraphs that follow discuss the two main court of appeals decisions and the position the SEC took in them.

A panel of the Fifth Circuit in *SEC v. Hallam*265 provided the most extensive discussion, and the majority concluded that the new statute did not codify *Liu*.266 “Congress used the term ‘disgorgement’ to authorize the sorts of disgorgement awards courts were ordering before *Liu*.”267 The new statute authorized legal disgorgement apart from the equitable disgorgement permitted by *Liu*. The court reasoned:

263 See SCALIA & GARNER, supra note 67, at 93 (“[A] matter not covered is not covered”).


265 SEC v. Hallam, 42 F.4th 316 (5th Cir. 2022).

266 *Id.* at 337–39.

267 *Id.* at 339.
If we presume that Congress was aware of Liu, its decision substantially to amend the statute six months later concerning the same subject is unlikely to be an imprimatur. Such swift, expansive action is more consistent with a desire to curtail the Court’s decision—that is, to permit the sort of disgorgement awards ordered before [Liu].

The SEC’s position in Hallam was that the new disgorgement statute codified Liu.

The Hallam court did not reach several important questions about the relationship between the new statute and Liu. The majority said it did not need to resolve questions about the interpretation of Liu, the continued existence of equitable disgorgement in the wake of the new statute, or the need for a disgorgement award to be paid to victims, although it noted that the new statute did not include the “for the benefit of investors” language.

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268 Id. at 341. If congressional awareness of a Supreme Court decision such as Liu is important to a court’s decision, the court should not presume it; the court should have an evidentiary basis that it is true. The Hallam court cited no evidence from the public record that Congress was aware of Liu much less that Congress or relevant members approved or disapproved of it.

269 Id. at 337. In an earlier case in the Fifth Circuit, the SEC’s position was different. See SEC v. Blackburn, 14 F.4th 676, 681 n.4, 682 (5th Cir. 2021) (describing SEC position that new statute imposed fewer limitations on a court’s ability to order disgorgement than Liu and concluding that the court did not need the new statute because the district court disgorgement award met the Liu requirement of distribution to and for the benefit of victims).

270 A dispute among some appellate judges is whether Liu required the SEC to use an equitable accounting claim or to trace assets from a violation to obtain disgorgement. Hallam, 42 F.4th at 331–34; SEC v. de Maison, No. 18-2564, 2021 WL 5936385 (2d Cir. Dec. 16, 2021) (summary order) (not addressing the new disgorgement statute and stating that Liu did not require tracing and did not disturb the reasonable approximation of profits test); SEC v. Camarco, No. 19-1486, 2021 WL 5985058, at *2 n.3, *13–17 (10th Cir. Dec. 16, 2021) (not addressing the new disgorgement statute and stating that Liu did not require tracing and did not disturb the reasonable approximation of profits test); see id. at *21–23 (Bacharach, J., dissenting) (stating that Liu required accounting or tracing).

271 Hallam, 42 F.4th at 343–44.

272 Id. at 341.
of ‘unjust enrichment’ attributable to [a] securities violation.”

If the SEC met that burden, the burden then shifted to the defendant to prove a requested amount was not reasonable. Neither Liu nor the new statute addressed this framework.

In SEC v. Camarco, the majority of a Tenth Circuit panel left to another day whether the new statute allowed “disgorgement as a statutory-based remedy in law.” The SEC, in a supplemental briefing after the enactment of the new statute, had not argued that the statute effected any change from Liu and continued to claim equitable disgorgement in the case. In the dissenting judge’s view, the SEC admitted “that the new [statute] expressly authorizes ‘disgorgement’ as a form of ‘equitable relief,’” and the judge followed that reasoning.

These two courts of appeals decisions do not materially alter the approach in this Article. Hallam reached the same conclusion that the new disgorgement statute did not adopt Liu, although its reasoning had some similarities and some differences. Camarco did not resolve whether the new statute incorporated Liu. The SEC has not been consistent, but its position that the new statute codified or did not differ from Liu is contrary to the opposite conclusion explained in this Article.

IV. THE NEW SEC DISGORGEMENT STATUTE AND TREATMENT OF EACH SPECIFIC LIU LIMITATION

For the reasons outlined in this Article, many courts might not be willing to interpret the new disgorgement statute as conforming to Liu. For those courts, another interpretive approach might be more in line with the legislative text, context, and sound statutory construction. That approach would take each of the three Liu equitable limitations separately and consider the evidence of Congress’s will for each factor.

273 Id.
274 Id.
276 Id. at *2 n.3.
277 Id.
278 Id. at *25 (Bacharach, J., dissenting).
A. Solely the Defendant’s Profits

The text of the new statute imposes one of the three equitable limitations discussed in *Liu*. It requires a disgorgement order to apply only to a specific defendant’s unjust enrichment and not to the profits of others under a joint-and-several liability theory.

Congress defined disgorgement as “any unjust enrichment by the person who received such unjust enrichment as a result of” a violation of the securities laws.279 A court’s disgorgement order against a specific defendant is limited to the amount that defendant “received” and does not extend to an amount another person received. The words in the new statute do not permit a disgorgement order against a defendant for profits that the defendant did not obtain and that accrued solely to a different person.

The statutory language does not allow a disgorgement order to hold one person liable for the amount gained by another under theories of concerted wrongdoing, joint responsibility, or joint-and-several liability for actions by several wrongdoers.280 In an insider trading case, the insider tipper will not be obliged to disgorge the profits of the tippee or remote tippees.281 An investment adviser will not be obliged to disgorge profits that an investment fund made from a violation effected by the adviser.282 The statutory language does not appear to allow certain narrow types of joint or collective liability that *Liu* might have accepted: partners in wrongdoing, a legal entity controlled by the defendant, or a spouse involved in the misconduct.283

The principle is that a disgorgement order may extend no further than the ill-gotten gains a defendant received. The word

281 Before *Kokesh* and *Liu*, courts ordered tippers to disgorge the profits of tippees. See, e.g., SEC v. Warde, 151 F.3d 42, 49–50 (2d Cir. 1998); SEC v. Clark, 915 F.2d 439, 453–54 (9th Cir. 1990) (tipper liable for profits of a third party that did not violate the law); see also *Liu*, 140 S. Ct. at 1946 n.3.
282 See SEC v. Contorinis, 743 F.3d 296, 302–04 (2d Cir. 2014).
283 See *Liu*, 140 S. Ct. at 1949.
“received” has an ordinary public meaning, and courts should be cautious about substituting a broad interpretation. The ordinary public understanding of “received” is actual receipt or possession and not constructive receipt or indirect benefit.

The reason for the narrow language in the new disgorgement statute has not been publicly explained. The language appeared in the December 3, 2020 House conference report on the NDAA and in a Senate bill introduced in 2019 in response to *Kokesh*, as discussed in greater detail in the description of the legislative history. By the end of 2020, the Supreme Court had decided both *Liu* and *Kokesh*, and both decisions had expressed concern that the SEC had obtained disgorgement orders for amounts exceeding a defendant’s actual profits. The House conference report did not mention *Liu* or *Kokesh*, but members of Congress or congressional staff conceivably could have written “person who received such unjust enrichment” to respond to the Court’s concern. Alternatively, someone in Congress might have taken the phrase from the earlier Senate bill or sought to conform to the traditional rule for calculating the unjust enrichment of a wrongdoer. We do not know.

The definition in the new statute does not resolve all questions about joint-and-several liability for disgorgement. Facts in cases can be complicated. At the time of a disgorgement order, unlawful profits could rest in an account held jointly by two defendants or otherwise be commingled in a way that no single defendant had yet received or used them. One wrongdoer could

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284 *See supra* text accompanying note 103.
286 *See discussion supra* Section III.B.4.
288 *See RESTATEMENT § 51, cmt. e* (the profit for which a conscious wrongdoer is liable “is the net increase in the assets of the wrongdoer, to the extent that this increase is attributable to the underlying wrong”); DAN B. DOBBS, DOBBS LAW OF REMEDIES § 4.1(4), at 566 (2d ed. 1993) (calculation of disgorgement was “the increased assets in the hands of the defendant from the receipt of property”) (footnote omitted). A calculation of disgorgement or unjust enrichment should avoid, “so far as possible, the imposition of a penalty.” *RESTATEMENT § 51(4).*
have transferred a wrongful profit from a violation to a second wrongdoer. For example, a natural person could set up a wholly owned company to receive proceeds from a violation committed by both the natural person and the company and then have the company transfer all of the proceeds to the natural person.290

In the last situation, the individual could defend on the ground that receipt of the proceeds was not “as a result of” a violation and instead was a result of company action to distribute a dividend or capital. The SEC could argue that the individual controlled the disposition of funds at the company and came to possess the funds as a direct, close, and immediate consequence of a securities law violation for which that defendant was liable. Courts, the SEC, and defense lawyers will need to resolve arguments such as these with little to no guidance from the statutory words or legislative history, but in no event should disgorgement payments from two or more defendants for receipt of the same illegal profit exceed the total amount of unjust enrichment.

Courts should also reconsider the position of a relief defendant under the text of the new disgorgement statute. A relief defendant is an innocent third party who receives unlawful proceeds from a wrongdoer.291 The legal questions would be whether the innocent person obtained the proceeds “as a result of” a violation or an independent, volitional act of the defendant to make a gift or donation to the third party, whether the proceeds are “unjust enrichment” when possessed by the third party, and whether the new statute permits a disgorgement order against a person who did not commit a violation.292

290 Those were the facts in Hallam. The court said it did not matter that “fraudulent entities” made the unlawful sales of securities and then transferred money to Hallam. Hallam was a violator and met the disgorgement standard in the new statute. He was a person who received unjust enrichment as a result of a securities violation. SEC v. Hallam, 42 F.4th 316, 342 (5th Cir. 2022). The district court judgment against Hallam did not impose joint-and-several liability. Id. at 320.


292 The provision defining disgorgement is in section 21(d)(3)(A) of the Exchange Act, 15 U.S.C. § 78u(d)(3)(A), which, combined with section 21(d)(7), applies when a “person has violated” any of the securities laws. When that
B. Return of Funds to Victims

A second equitable principle in Liu was that a defendant’s gains should be returned to wronged investors for their benefit.293 As already discussed, the SEC’s preference is to use disgorgement amounts to compensate injured investors, but that is not legally required and is not always practical.294 When distributing money to victims in a particular case would not be efficient or cost-effective, the SEC deposits disgorgement collections in a fund in the Treasury.295 The Liu majority left open how a district court should proceed if it wanted to direct disgorgement collections to the Treasury.296 One possible outcome, before enactment of the new disgorgement statute, would have been that disgorgement could not be ordered because it would not qualify as equitable relief for the benefit of investors under section 21(d)(5).297

The new disgorgement statute does not require payment to injured investors as a condition for ordering disgorgement.298 Neither the text nor other evidence supports a requirement to return disgorged funds to investors with losses, and for the reasons discussed in this Article, the new law should not be read to adopt the Liu decision. The SEC disgorgement statute does not

occurs, a district court has power to impose a civil penalty and disgorgement. Both the civil penalty provision and the disgorgement provision refer back to “the person” and “such violation,” implying that the sanctions may be entered only against the violator, but the language is not free from doubt. The penalty provision refers to “the person who committed such violation,” but the disgorgement provision is different, referring to “the person who received such unjust enrichment as a result of such violation.” If the disgorgement statute applies to an innocent person, if a gift can be unjust enrichment, and if a decision to make a gift does not break the link with a violation, a court could order disgorgement against a relief defendant. Sections 50, 51, and 52 of the Restatement on innocent recipients, enrichment by misconduct, and responsible parties could provide further guidance. RESTATEMENT §§ 50–52.

293 Liu, 140 S. Ct. at 1944, 1947.
295 See supra text accompanying notes 208–15.
296 Liu, 140 S. Ct. at 1948–49.
297 Vollmer, What Remains of Kokesh, supra note 53.
depend on section 21(d)(5) (equitable relief for the benefit of investors) for statutory authorization and, therefore, severs the connection found in Liu between the authorization for disgorgement and the statutory language requiring the relief to benefit investors.299

In addition, Congress passed an earlier statute approving of disgorgement orders that do not pay victims. In 2010, Congress created an Investor Protection Fund for the SEC to pay awards to whistleblowers and to fund the SEC Inspector General.300 The Fund was to receive any disgorgement collected by the SEC “that is not added to a disgorgement fund . . . or otherwise distributed to victims of a violation of the securities laws.”301 Congress wanted disgorgement orders to proceed, even if the money could not be returned to injured investors.

The Liu majority discussed this statute but questioned whether it comported with “the equitable nature of the profits remedy” or the requirement to benefit investors in section 21(d)(5).302 Since the passage of the new disgorgement statute, the need to satisfy the concept of equitable relief in section 21(d)(5) does not matter. What matters is the meaning of the new statute within the context of related statutes the legislature enacted. In the statute creating the Investor Protection Fund, Congress expressed its will that the return of money to harmed investors is not essential for the availability of a disgorgement

299 See SEC v. Spartan Sec. Grp., Ltd., 620 F. Supp. 3d 1207, 1223–25, (M.D. Fla. 2022). The parties agreed that distribution of disgorgement to investors was not feasible, and the SEC argued that the disgorged amount should be deposited with the Treasury. The district court reasoned that the new disgorgement statute explicitly provides authority to order disgorgement and does not require that disgorgement be “for the benefit of investors,” as required by section 21(d)(5). The court held that it may order disgorgement and direct that disgorged funds be sent to the Treasury under the new disgorgement statute. It applied the Liu requirement to deduct legitimate expenses and required the defendant to pay prejudgment interest on the disgorgement amount. Id. See also SEC v. Hallam, 42 F.4th 316, 344 (5th Cir. 2022) (noting that the new statute does not contain “for the benefit of investors” language).


remedy. That will should govern and should not yield to a principle of equitable relief the Supreme Court identified for a different purpose.

The Investor Protection Fund statute also raises the question of whether the Liu majority was correct that the equitable nature of disgorgement generally required a return of the defendant’s gains to victims.\footnote{See id. at 1944.} The practice of courts of equity in England in the nineteenth century was that a victim of misconduct typically received a disgorgement payment, but that was because of the system of private enforcement of rights.\footnote{See Stephen Watterson, An Account of Profits or Damages? The History of Orthodoxy, 24 OXFORD J. OF LEGAL STUD. 474, 475 (2004) (discussing patent litigation practice and remedies at law and in equity before 1852 in England).} Victims initiated suits in equity in their own interest and sought relief for themselves because of the defendants’ interference with the plaintiffs’ protected rights. The plaintiff did not seek a distribution of recovered gains for the benefit of unrelated third parties. If the plaintiff was successful on the claim and if the court ordered disgorgement, the plaintiff-victim would receive the payment as a result of the nature of the judicial system.\footnote{Situation involving a trust presented a variant. A trustee or trust beneficiary could sue for disgorgement in certain circumstances, and, if successful, the payment would be made to the trust, which would benefit all beneficiaries. In these situations, the plaintiff had duties or interests closely aligned with the person receiving a disgorgement payment (the trust). The trust cases therefore were not exceptions to the need for a victim to be the plaintiff in a disgorgement case.} Equity did not develop a rule requiring payment of disgorgement to a victim as a prerequisite to a court’s power to order disgorgement.\footnote{I am grateful to Nicholas Le Poidevin, K.C. for guidance on English equity practice.} The U.S. legal system similarly relied mainly on private enforcement until government agencies acquired more expansive enforcement and remedial powers.

The three cases cited by the Liu majority do not stand for the proposition that equity would not award disgorgement or its predecessors unless the payment went to victims of the unlawful conduct.\footnote{The opinion in Liu recounted that:} Two of the decisions were private claims for patent
infringement in courts of law, not equity. In both, the Court described the different rules for relief for patent infringement in courts of law as opposed to equity. Both decisions referred to equity’s process of treating the defendant-infringer as a trustee of the profits he made by use of the plaintiff’s invention and having a master then calculate the defendant’s profits for payment to the plaintiff. Neither decision stated a general rule that a profit-based remedy was not available unless the payment went to a victim.

The third case was a suit in equity, but it had nothing to do with disgorgement or a profit-based remedy. Two parties deposited money with a committee, which was supposed to pay the money to one or the other in accordance with the terms of a contract. The Court called the deposit a trust, identified the committee as a trustee of the funds, confirmed a court of equity had jurisdiction, and then discussed the remedies a court of equity could order in a trust case. Courts of equity would decree the payment of money if necessary, and that could involve an accounting by the trustee for what he had done and the distribution of the money in the trust to beneficiaries. That relief did

[T]he profits remedy often imposed a constructive trust on wrongful gains for wronged victims. The remedy itself thus converted the wrongdoer, who in many cases was an infringer, “into a trustee, as to those profits, for the owner of the patent which he infringes.” Burdell v. Denig, 92 U.S. 716, 720 (1876). In “converting the infringer into a trustee for the patentee as regards the profits thus made,” the chancellor “estimat[es] the compensation due from the infringer to the patentee.” Packet Co. v. Sickles, 19 Wall. 611, 617–18 (1874); see also Clews v. Jamieson, 182 U.S. 461, 480 (1901) (describing an accounting as involving a “distribution of the trust moneys among all the beneficiaries who are entitled to share therein” in an action against the governing committee of a stock exchange).

Liu, 140 S. Ct. at 1944.

309 See Burdell, 92 U.S. at 720; Packet Co., 86 U.S. at 617–18.
310 See Burdell, 92 U.S. at 719–20; Packet Co., 86 U.S. at 617.
312 See id. at 478–79, 484.
313 See id. at 478–80.
314 See id.
not necessarily relate to a person’s misconduct, ill-gotten gains, or payment to a victim.\textsuperscript{315}

The weakness of the \textit{Liu} majority’s position on payment of disgorgement to victims is a secondary consideration. The primary conclusion is that Congress enacted a law permitting disgorgement orders without payment to victims and that the new SEC disgorgement statute offers no reasonable ground to countermand that preference. The new statute should not be interpreted to require payment of disgorgement to victims or to alter the SEC’s practice of distributing disgorgement to injured investors when practicable.

\textbf{C. Deduction of Legitimate Expenses}

The third equitable limitation in \textit{Liu} was that disgorgement should not exceed the net profits from wrongdoing after deducting legitimate expenses.\textsuperscript{316} The text of the new statute and materials from Congress do not address this issue, but a canon of construction provides some guidance.

Congress provided no information about deductions of the wrongdoer’s expenses from the disgorgement amount other than to use the words disgorgement and unjust enrichment in the statute.\textsuperscript{317} History and context show that Congress used the words to refer to a form of relief in litigation and SEC enforcement cases, not to the ordinary public meanings of the terms.\textsuperscript{318}

Those circumstances justify the consideration of the canon of construction that states that a statutory word with an established legal meaning should be construed in accordance with that meaning. This Article discussed the canon earlier, but the question then was whether the new disgorgement statute should be presumed to incorporate the \textit{Liu} decision describing equitable limitations.\textsuperscript{319} The question here is different. It is whether the legal terms disgorgement and unjust enrichment carry with them accepted and settled standards, definitions, and approaches, including, in particular for our purposes, whether the calculation of

\textsuperscript{315} See \textit{id.} at 479–80.
\textsuperscript{317} NDAA § 6501, 134 Stat. at 4625–26.
\textsuperscript{318} See supra notes 80–83 and accompanying text.
\textsuperscript{319} See supra notes 276–77 and accompanying text.
a disgorgement amount should deduct legitimate expenses of the defendant from gross receipts.

The answer is yes. Courts and other legal authorities have been measuring wrongful gain, restitution, and disgorgement for a long time and have developed a substantial body of law on the appropriate way to calculate unjust enrichment. The calculation includes determining the value of benefits obtained and allowable credits and deductions. The *Liu* majority cited several older precedents addressing these issues. Courts applying the new statute could also consult judicial decisions calculating disgorgement in SEC cases and apply rules on the deduction of expenses that courts accepted as settled.

An additional resource is the Restatement (Third) of Restitution and Unjust Enrichment. Its calculation of unjust enrichment excludes certain expenses from a disgorgement amount in a way that is similar to the *Liu* equitable principle on the deduction of legitimate expenses. The Restatement stipulates that unjust enrichment is net profit, not gross profit, attributable to the underlying wrong. Credits for money the defendant expended on some items should be allowed, but credit should be denied for “expenditures incurred directly in the commission of a wrong.”

The Restatement has detailed rules, comments, and illustrations

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321 Id. at 802–04.
323 See, e.g., SEC v. JT Wallenbrock & Assocs., 440 F.3d 1109, 1113–14 (9th Cir. 2006) (discussing the deduction of business and operating expenses); SEC v. Smyth, 420 F.3d 1225, 1230, 1233 (11th Cir. 2005) (ordering hearing to consider, among other things, an offset of certain expenses from the amount of disgorgement); SEC v. Brown, 658 F.3d 858, 861, 862 (8th Cir. 2011) (majority and dissent disagreeing about deduction of expenses and citing authorities). *Liu* said courts occasionally declined to deduct legitimate expenses from the receipts of fraud, *Liu*, 140 S. Ct. at 1946, but that does not appear to be the accepted and established approach.
324 RESTATEMENT § 51.
325 Id. § 51(4)–(5).
326 Id. § 51(4). Net profit for disgorgement therefore could differ from the calculation of the “gross amount of pecuniary gain to such defendant as a result of the violation” for purposes of civil penalties. See 15 U.S.C. § 78u(d)(3)(B).
327 Id. § 51(5)(c).
on determining the value that a defendant received and the expenses that should be excluded from the disgorgement amount.\footnote{See id. § 51(4)–(5), at 203–04; id. cmt. h.}

The Restatement and disgorgement precedents can also guide courts on other questions about the meaning of disgorgement in the new statute, but not all precedents meet the canon’s requirement of applying established interpretations. 

\textit{Liu} said that some courts in SEC enforcement cases were receptive to aggressive forms of disgorgement.\footnote{\textit{Liu} v. SEC, 140 S. Ct. 1936, 1946–47 (2020). As explained, the position of the Restatement on the deduction of legitimate expenses does not appear to be subject to this \textit{Liu} criticism. As for the other two equitable limitations discussed in \textit{Liu}, the Restatement is consistent on the question of joint-and-several liability, but it is not needed because the text of the new disgorgement statute excludes many types of joint-and-several liability. See supra note 283 and accompanying text. The Restatement does not discuss payment of disgorgement to victims of misconduct as a prerequisite. The premise is private enforcement for interference by the defendant with a claimant’s legally protected interests. RESTATEMENT § 51(1) & cmt. a.}

Otherwise, the canon on incorporation of legal terms makes the Restatement and case law useful when they state a well-settled legal principle.

Congress used the legal terms disgorgement and unjust enrichment in the new statute and reasonably could be presumed to incorporate features of disgorgement that are settled and established in the law. The Restatement and precedents provide a solid ground for concluding that an established feature is the deduction of certain legitimate expenses from a gross disgorgement amount.\footnote{RESTATEMENT § 51.}

This is an instance in which general disgorgement law overlaps with and includes one of the \textit{Liu} equitable limitations.\footnote{See \textit{Liu}, 140 S. Ct. at 1950.}

\section*{Conclusion}

Congress passed the new SEC disgorgement statute hard on the heels of the Supreme Court’s \textit{Liu} decision, causing some observers to believe that the new statute meant to define disgorgement the way \textit{Liu} did and incorporate the equitable limitations \textit{Liu} described. A careful review of the text, context, and
legislative history of the new statute does not support that interpretation. Neither the text of the statute nor the legislative history commented with approval or disapproval of Liu. Canons of statutory interpretation also proved largely unhelpful, although some support for a construction of the statute as adopting Liu can be derived from a loose and unpersuasive application of certain of these legal maxims.

A better approach to understanding the new statute is to think separately about the different equitable principles found in Liu and to analyze the statute to reach an appropriate interpretation of each one. The statutory text defining disgorgement as unjust enrichment the defendant received supports the application of a strict form of the Liu limitation preventing one defendant from being ordered to disgorge profits a different person received. The statutory context of the new disgorgement statute, specifically a provision in a 2010 securities enactment, provides a solid basis for rejecting the Liu limitation requiring the return of disgorgement amounts to injured investors.

Finally, a canon of construction provides a basis for applying the Liu principle limiting an award to net profits from wrongdoing after deducting legitimate expenses. The canon of construction states that a statutory word with an established legal meaning should be construed in accordance with that meaning. Part of the established meaning of disgorgement and unjust enrichment as forms of legal relief is that certain expenses should be deducted to calculate a net profit.

This approach preserves legislative supremacy by construing the new SEC disgorgement statute according to traditional methods of statutory interpretation. The availability of disgorgement as a remedy in SEC enforcement cases is no longer a question about legal versus equitable remedies or about a court’s equitable powers to develop ancillary relief.