



NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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January 16, 2018

The Honorable Jeb Hensarling
Chairman
House Financial Services Committee
2129 Rayburn House Office Building
Washington, DC 20515

The Honorable Maxine Waters
Ranking Member
House Financial Services Committee
4340 O'Neil Federal Office Building
Washington, DC 20024

Re: H.R. 4738, the "Mutual Fund Litigation Reform Act"

Dear Chairman Hensarling and Ranking Member Waters:

On behalf of the North American Securities Administrators Association (NASAA),¹ I write to express concern regarding H.R. 4738, the "Mutual Fund Litigation Reform Act," which is scheduled to be considered by the House Financial Services Committee this week. This legislation would amend Section 36(b) of the Investment Company Act of 1940 (ICA) to make it extraordinarily difficult for investors to successfully pursue legal recourse against mutual fund advisers for breach of fiduciary duty.

Section 36(b) of the ICA provides mutual fund investors with a cause of action against mutual fund investment advisers that charge investors excessive advisory fees. Section 36(b) is the only private cause of action in the ICA. In 2010, the Supreme Court adopted the so-called Gartenberg test as the proper standard for Section 36(b) claims.² This test poses a significant hurdle to plaintiffs, who must show that an adviser charged a fee "so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining."³

H.R. 4738 would place two new and additional burdens on investors contemplating action under Section 36(b) of the ICA by elevating the pleading standard and the burden of proof required for successful claims. First, by raising the pleading standard, H.R. 4738 stands to put investors in a Catch-22: they will be required to plead specific facts that show an adviser's fee was excessive yet they will have no ability at this stage of litigation to discover these facts through subpoenas for documents or testimony. Second, by elevating the evidentiary standard from the current "preponderance of the evidence" standard to the more stringent "clear and convincing evidence" standard, the bill would make it significantly more challenging for investors to prevail even if they successfully plead their claims. Taken together, the impact of the changes made by H.R. 4738 would be to tip the scales of justice in Section 36(b) disputes strongly in favor of investment advisers, to the detriment of ordinary American retail investors.

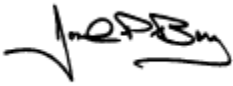
¹ The oldest international organization devoted to investor protection, the North American Securities Administrators, Inc. was organized in 1919. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² *Jones v. Harris Assoc.*, 559 U.S. 335 (2010).

³ *Id.* at 344.

Thank you for your consideration of NASAA's views. Please don't hesitate to contact me or Michael Canning, NASAA's Director of Policy and Government Affairs, at (202) 683-2307, I we may be of any additional assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "J. P. Borg". The signature is stylized with a large initial "J" and a long horizontal stroke at the end.

Joseph P. Borg
NASAA President and Alabama Securities Director