



## NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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September 17, 2019

The Honorable Maxine Waters  
Chairwoman  
House Committee on Financial Services  
2129 Rayburn House Office Building  
Washington, DC 20515

The Honorable Patrick McHenry  
Ranking Member  
House Committee on Financial Services  
2129 Rayburn House Office Building  
Washington, DC 20515

Re: The Investor Protection and Capital Market Fairness Act of 2019 (as amended)

Dear Chairwoman Waters and Ranking Member McHenry:

On behalf of the North American Securities Administrators Association (NASAA),<sup>1</sup> I am writing to express strong support for the Investor Protection and Capital Market Fairness Act, as amended by the Amendment in the Nature of a Substitute offered by Rep. McAdams. As amended, the legislation grants the SEC statutory authority to seek, and federal courts to grant, disgorgement within 14 years, and requires the SEC to submit to Congress specific data about its enforcement actions.

Under existing law, the SEC has authority to seek disgorgement through its own administrative proceedings but lacks explicit authority to do so in federal court. Traditionally, this has not been a problem, and the SEC for decades relied on federal courts' own inherent equitable powers to obtain disgorgement from wrongdoers. However, the necessity for Congress to explicitly set forth by statute the SEC's disgorgement authority in federal law has been brought to the fore by the U.S. Supreme Court's 2017 decision in *Kokesh v. SEC*.<sup>2</sup>

In *Kokesh*, the Supreme Court reversed decades of established jurisprudence by holding that SEC disgorgement operates as a "penalty," and therefore, is subject to the five-year statute of limitations in 28 U.S.C. § 2462.<sup>3</sup> Furthermore, the Court in a footnote questioned the SEC's ability even to seek disgorgement in federal court.<sup>4</sup> This decision has severely limited the SEC's ability to recover investor funds from fraudsters. Disgorgement and penalties account for a tremendous amount of money – \$3.9 billion in FY 2018 – that was ordered to be paid by bad actors.<sup>5</sup> While

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<sup>1</sup> The oldest international organization devoted to investor protection, NASAA was organized in 1919. Its membership consists of the 67 state, provincial, and territorial securities regulatory agencies of the United States, Canada, and Mexico. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

<sup>2</sup> *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

<sup>3</sup> Section 2462 establishes a five-year statute of limitations for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture," except as otherwise provided by Congress.

<sup>4</sup> *Kokesh* at n.3.

<sup>5</sup> See SEC's Division of Enforcement 2018 Annual Report at 5, 11, available at <https://www.sec.gov/files/enforcement-annual-report-2018.pdf>.

the SEC was able to return \$149 million in disgorged funds to harmed investors in FY 2018, SEC Chairman Jay Clayton stated that the *Kokesh* decision has led to the loss of approximately \$900 million in disgorgement in filed cases for that fiscal year.<sup>6</sup> These are funds that rightfully belong to investors.

While the *Kokesh* decision has tied the hands of the SEC, which must adjust and prioritize its enforcement activities accordingly, the American public should not have to suffer as a result. Congress can and should override this rulings. The proposed legislation does that by providing the SEC with the authority to bring an action or proceeding that seeks disgorgement within 14 years after the alleged violation. It further clarifies that disgorgement should not be construed as a penalty under Chapter 143 of Part VI of Title 28, U.S. Code, which includes Section 2462 that imposes a five-year statute of limitations.

NASAA further appreciates that the bill will require the SEC to submit information about each of its enforcement actions during the 10 year period following the bill's enactment. This information includes the type of enforcement action, type of issuer, approximate duration of the underlying misconduct (including the top ten enforcement actions with the longest durations of misconduct), and approximate duration of the investigation. This type of data will help inform policymakers about effects that statutes of limitations play in the enforcement of the federal securities laws.

Finally, NASAA believes Congress should consider further strengthening the bill by amending Page 2, lines 3-4, to make clear that a broad SEC injunction to “obey the law” shall not be considered a penalty.<sup>7</sup>

Thank you for your consideration of NASAA's views. Please do not hesitate to contact me, or Michael Canning, NASAA Director of Policy & Government Affairs, at (202) 737-0900, if we may be of any additional assistance.

Sincerely,



Christopher W. Gerold  
NASAA President and New Jersey Securities Bureau Chief

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<sup>6</sup> *See id.* at 5.

<sup>7</sup> Such an amendment would address uncertainties arising from a recent federal district court decision that held that a broad “obey the law” type injunction – which the SEC commonly uses in all its enforcement actions – was a penalty under *Kokesh*. *See Gentile v. SEC*, No. 16-cv-1619, 2017 WL 6371301 (May 14, 2019). This bill should make clear that *Gentile* is no longer good law.