SIFMA Statement in Opposition to H.R. ____"To amend the Securities Exchange Act of 1934 to allow the Securities and exchange Commission to seek and Federal courts to grant restitution to investors and disgorgement of unjust enrichment."

Markup of Legislation in the Committee on Financial Services U.S. House of Representatives

09/16/2019

Chairwoman Waters, Ranking Member McHenry and members of the House Financial Services Committee, we appreciate the opportunity to provide comments. SIFMA and its member firms are strongly opposed to H.R. ____"To amend the Securities Exchange Act of 1934 to allow the Securities and exchange Commission to seek and Federal courts to grant restitution to investors and disgorgement of unjust enrichment."

Prior to the 2017 Kokesh v SEC, 137 S. Ct. 1635 (Kokesh) decision, the SEC used its equitable power to seek disgorgement. Since these were equitable claims, they were not subject to any statute of limitations. In Kokesh, the Supreme Court unanimously held that the manner in which the SEC sought disgorgement from respondents operated as a penalty, and Justice Sotomayor delivered the opinion that any claim for disgorgement by the SEC is subject to the 5-year statute of limitations on civil penalties under 28 U.S.C § 2462.

SIFMA strongly opposes increasing the limitations period of 5-years to 14 years, particularly where the SEC has historically used disgorgement to punish respondents, rather than recover monies for investors, as the Court found in Kokesh.[1] The Court appropriately curtailed the SEC's use of disgorgement to a 5-year limitations period in recognition of its historical overreach in wielding it against respondents.[2] Congress should not upend the reasoned and sound judgment of the Court by increasing the limitations period, which historically has not been appropriately applied, and that is

[1] *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (SEC's $34.9M disgorgement request was punitive, given that $29.9M was outside the 5-year limitations period (going back an additional 6 years); it included an additional $18.1M in pre-judgement interest; and it didn't credit back Mr. Kokesh's significant expenses incurred in producing the revenue subject to the disgorgement).

[2] *See SEC v. Fischbach Corp.*, 133 F. 3d 170, 175 (CA2 1997) (SEC disgorgement is punitive in the many cases where it is not paid back to victims, but instead retained by the SEC or U.S. Treasury); *SEC v. Contorinis*, 743 F. 3d 296, 302 (CA2 2014) (SEC disgorgement overreach in forcing tippers who provide confidential information to others to disgorge the profits those others gained by trading on the information – even though the tippers received *no* profits); confidential information to others to disgorge the profits those others gained by trading on the information – even though the tippers received *no* profits); *SEC v. Teo*, 746 F.3d 90 (3d Cir. 2014) (SEC disgorgement overreach by forcing a company employee who commits or assists in a violation to "disgorge" all or portions of his or her salary, apparently on the theory that they were paid for the violations and not to perform actual duties as employees.

unnecessary to recover monies for harmed investors (the SEC's equitable restitution power is entirely sufficient for that purpose).

In addition, SIFMA strongly opposes this bill for the reasons stated in our amicus brief in *Kokesh*[3], as follows: pursuit of old and stale claims poses the threat of governmental overreach, as Congress has previously recognized in establishing the existing statues of limitations and repose for actions involving alleged violations of the securities laws.

Requiring the SEC to bring disgorgement claims within 5 years of an alleged violation promotes effective deterrence and is more than enough time for the SEC to discover a securities-law violation and file a complaint. A longer limitations period would detract from the agency's effectiveness in pursuing ongoing misconduct and preventing recurring offenses that lead to investor losses. It would also run the risk of undermining the due process rights of innocent defendants and their ability to prove their blamelessness. A rule that allows the government to sleep on its rights for more than a decade and then bring a disgorgement claim when a defendant's potential defenses have all but disappeared promotes the wrong kind of incentives and diminishes an important check on government enforcement.

The SEC's primary enforcement mission is remedial in nature – the cessation of ongoing misconduct and the prevention of recurring offenses that lead to investor losses – not punitive[4]**.** Although Congress decided in 1990 to provide the SEC with the ability to seek civil penalties in order to punish and deter violators, those punitive pursuits were intended to be only a supplement to existing punitive, criminal enforcement of the securities laws, and not a substitute for the SEC's primary civil remedial authority[5]. It is clear that a firm, short-term end date for enforcement actions seeking punitive sanctions encourages the SEC to focus on this mission.

Lastly, the Department of Justice already has a 10-year limitations period under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) to pursue fraudulent schemes like Madoff and Stanford which are cited by proponents of extending the statute of limitations. We contend that the SEC does not require the same extensive authority.

In conclusion, this proposed bill is unnecessary for the SEC to accomplish its securities enforcement goals. It fails to better remediate harmed investors, runs contrary to the interests of fair and equitable justice and promotes harmful uncertainty throughout the market.

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[3] *See* https://www.sifma.org/resources/submissions/kokesh-v-sec/.

[4] *See* SEC Enf. Manual at 1.

[5] *See* S. Rep. No. 101-337, at 11 (1990) ("The Committee anticipates that the SEC will not seek or impose a civil money penalty in every case"); *see also id.* at 11–12; Securities Law Enforcement Remedies Act of 1989: Hearings on S. 647 Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs, 101st Cong., 2nd Sess. 44–45 (1990) (statement of Richard C. Breeden, Chairman, SEC) ("[W]here the defendant in a Commission action is also the subject of a criminal prosecution, the imposition of a civil money penalty in the Commission's action may not be needed to achieve deterrence").