

STRENGTHENING FRAUD PROTECTION PROVISIONS FOR SEC ENFORCEMENT ACT OF 2019

FEBRUARY 21, 2020.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Ms. WATERS, from the Committee on Financial Services,
submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3701]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 3701) to establish a statute of limitations for certain actions of the Securities and Exchange Commission, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Strengthening Fraud Protection Provisions for SEC Enforcement Act of 2019”

SEC. 2. STATUTE OF LIMITATIONS FOR COMMISSION ACTIONS.

(a) IN GENERAL.—Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 75u) is amended by adding at the end the following:

“(j) STATUTE OF LIMITATIONS.—

“(1) CIVIL MONETARY PENALTIES.—

“(A) IN GENERAL.—An action or proceeding brought or instituted by the Commission under any provision of the securities laws for a civil monetary penalty may be brought not later than 10 years after the alleged violation.

“(B) EXCLUSION.—The period of limitations in subparagraph (A) does not run during any time when an alleged violator is absent from the United States or has no reasonably ascertainable place of abode or work within the United States.

“(2) DEFINITION.—For purposes of this subsection, the term ‘civil monetary penalty’ means relief sought by the Commission under—

“(A) subsection (d)(3), section 10A(d), section 21A(a), section 21B(a), or subsection (b), (c)(1)(B), or (c)(2)(B) of section 32 (15 U.S.C. 75j-1(d), 75u-2(a), 75ff(b), 75ff(c)(1)(B), or 75ff(c)(2)(B));

“(B) section 5A(g)(2) or section 20(d)(2) of the Securities Act of 1933 (15 U.S.C. 77h-1(g)(2), 77t(d)(2));

“(C) section 9(d)(1) or 42(e)(1) of the Investment Company Act of 1940 (15 U.S.C. 50a-9(d)(1), 50a-41(e)(1));

“(D) section 203(i)(1) or 209(e)(1) of the Investment Advisers Act of 1940 (15 U.S.C. 50b-3(i)(1), 50b-9(e)(1)); or

“(E) section 304(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7243(a)).”

(b) CONFORMING AMENDMENT.—Section 21A(d) of the Securities Exchange Act of 1934 (15 U.S.C. 75u-1(d)) is amended by striking paragraph (5).

PURPOSE AND SUMMARY

On July 11, 2019, Representative Vincente Gonzalez introduced H.R. 3701, the Strengthening Fraud Protection Provisions for SEC Enforcement Act of 2019, which would provide the Securities and Exchange Commission (SEC) with a 10-year statute of limitations for civil monetary penalties, which would begin on the date at which the violation occurred.

BACKGROUND AND NEED FOR LEGISLATION

In *Gabelli v. SEC*, the Supreme Court held that the SEC has a five-year limit, or statute of limitations, to seek a civil penalty against a defendant and that the five-year limit begins at the date the violation occurs, not the date the SEC discovered it.¹ This bill would overturn that holding and provide the SEC with a 10 year limitation. The bill is similar to a bill in the Senate from the 114th Congress (S. 1960).

At a June hearing before the Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, Professor Urska Velikonja of Georgetown University stated that if the *Gabelli* ruling remains the governing law for civil monetary penalties in securities enforcement cases, “securities violators could defraud investors with impunity, so long as they avoid prosecution for five years.”² Former SEC prosecutor Jordan Thomas echoed this noting

¹ *Gabelli v. SEC*, 565 U.S. 442 (2013).

² Putting Investors First: Examining Proposals to Strengthen Enforcement Against Securities Law Violators, Hearing before the Subcomm. on Investor Protection, Entrepreneurship, and

that this legislative response would help strengthen the SEC’s “enforcement arsenal” because “many of the largest and most egregious securities violations occur over extended periods of time Thus, lengthening the statute of limitations for civil money penalties to 10 years would better enable the Commission to seek and obtain penalties commensurate with the full scope of the violation in such cases.”³ This bill is supported by the North American Securities Administrators Association (NASAA) and Public Citizen.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section provides that H.R. 3701 may be cited as the Strengthening Fraud Protections Provisions for SEC Enforcement Act of 2019.

Section 2. Statute of limitations for commission actions

Subsection (a) amends section 21 of the Securities Exchange Act of 1934 by adding a new subsection (j). The new subsection (j) provides that an action or proceeding brought or instituted by the SEC is subject to a 10-year statute of limitations after the alleged violation. The statute of limitations does not run during any time when the alleged violator is absent from the United States or has no reasonable ascertainable place of abode or work within the United States. The subsection also clarifies that the term “civil monetary penalty” under the act is the same term as defined under the relevant securities laws.

Subsection (b) of this section makes a conforming amendment.

HEARINGS

For the purposes of section 103(i) of H. Res. 6 for the 116th Congress, the Committee on Financial Services’ Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets held a hearing to consider H.R. 3701 entitled, “Putting Investors First: Examining Proposals to Strengthen Enforcement Against Securities Law Violators” on June 19, 2019. Testifying before the Committee was Jordan A. Thomas, Partner, Labaton Sucharow; Urska Velikonja, Professor of Law, Georgetown University Law Center; Andrew N. Vollmer, Professor of Law, University of Virginia School of Law; and Stephen Crimmins, Partner, Murphy & McGonigle, PC.

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on July 16, 2019, and ordered H.R. 3701 to be reported favorably to the House with an amendment in the nature of a substitute by a vote of 33 yeas and 25 nays, a quorum being present.

Capital Markets of the H. Comm on Financial Services, 116th Cong. (2019) (statement of Urska Velikonja, Professor, Georgetown University).

³ Putting Investors First: Examining Proposals to Strengthen Enforcement Against Securities Law Violators, Hearing before the Subcomm. on Investor Protection, Entrepreneurship, and Capital Markets of the H. Comm on Financial Services, 116th Cong. (2019) (statement of Jordan Thomas).

COMMITTEE VOTES AND ROLL CALL VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 3701:

Present	Representatives	Ayes	Nays
	Ms. Waters, <i>Chairwoman</i>	X	
	Mrs. Maloney	X	
	Ms. Velázquez	X	
	Mr. Sherman	X	
	Mr. Meeks	X	
	Mr. Clay	X	
	Mr. Scott	X	
	Mr. Green	X	
	Mr. Cleaver	X	
	Mr. Perlmutter	X	
	Mr. Himes	X	
	Mr. Foster	X	
	Mrs. Beatty	X	
	Mr. Heck		
	Mr. Vargas	X	
	Mr. Gottheimer	X	
	Mr. Gonzalez (TX)	X	
	Mr. Lawson	X	
	Mr. San Nicolas	X	
	Ms. Tlaib	X	
	Ms. Porter	X	
	Ms. Axne	X	
	Mr. Casten	X	
	Ms. Pressley	X	
	Mr. McAdams	X	
	Ms. Ocasio-Cortez	X	
	Ms. Wexton	X	
	Mr. Lynch	X	
	Ms. Gabbard	X	
	Ms. Adams	X	
	Ms. Dean	X	
	Mr. Garcia (IL)	X	
	Ms. Garcia (TX)	X	
	Mr. Phillips	X	
34			
	Mr. McHenry, <i>Ranking Member</i>		X
	Ms. Wagner		X
	Mr. King		X
	Mr. Lucas		X
	Mr. Posey		X
	Mr. Luetkemeyer		X
	Mr. Huizenga		X
	Mr. Duffy		X
	Mr. Stivers		X
	Mr. Barr		X
	Mr. Tipton		X
	Mr. Williams		
	Mr. Hill		X
	Mr. Emmer		X
	Mr. Zeldin		X
	Mr. Loudermilk		X
	Mr. Mooney		X
	Mr. Davidson		X
	Mr. Budd		X
	Mr. Kustoff		X
	Mr. Hollingsworth		X
	Mr. Gonzalez (OH)		X
	Mr. Rose		X
	Mr. Steil		X
	Mr. Gooden		X
	Mr. Riggleman		X
26			

Committee on Financial Services

Full Committee
116th Congress (1st Session)

Date: 7/16/2019

Measure __ HR 3701 as amended (Final Passage)

Amendment No. _____

Offered by: Rep. Gonzalez (TX)

Agreed To	Yes	No	Prsnt	Wdm
Voice Vote	Ayes		Nays	

Record Vote	FC
	33-25

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF
THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause (3)(c) of rule XIII of the Rules of the House of Representatives, the goals of H.R. 3701 are to ensure that the SEC has a longer time period to bring actions for civil monetary penalties.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 305(a) of the *Congressional Budget Act of 1974*, and pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the *Congressional Budget Act of 1974*, the Committee has received the following estimate for H.R. 3701 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 20, 2020.

Hon. MAXINE WATERS,
*Chairwoman, Committee on Financial Services,
House of Representatives, Washington, DC.*

DEAR MADAM CHAIRWOMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3701, the Strengthening Fraud Protection Provision for SEC Enforcement Act of 2019.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Nathaniel Frentz.

Sincerely,

MARK P. HADLEY
(For Phillip L. Swagel, Director).

Enclosure.

At a Glance			
H.R. 3701, Strengthening Fraud Protection Provisions for SEC Enforcement Act of 2019			
As ordered reported by the House Committee on Financial Services on July 16, 2019			
By Fiscal Year, Millions of Dollars	2020	2020-2025	2020-2030
Direct Spending (Outlays)	1	106	164
Revenues	30	480	730
Increase or Decrease (-) in the Deficit	-29	-374	-566
Spending Subject to Appropriation (Outlays)	*	*	*
Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2031?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	Yes, Under Threshold
* = between -\$500,000 and \$500,000.			

The bill would:

- Lengthen the statute of limitations for the Securities and Exchange Commission (SEC) to seek civil monetary penalties for violations of securities law.

Estimated budgetary effects would primarily stem from:

- Increased collections of civil monetary penalties and distributions to harmed investors;
- Increased payments to whistleblowers.

Areas of significant uncertainty include:

- Predicting the amount of penalties that the SEC orders, collects, and distributes under current law and how those collections and related spending would change under the bill;
- Estimating the amount and timing of payments to whistleblowers.

Bill summary: H.R. 3701 would allow the Securities and Exchange Commission (SEC) to seek a civil monetary penalty from a securities law violator for 10 years after an alleged violation. Under current law, the statute of limitations is 5 years.

Estimated Federal cost: The estimated budgetary effect of H.R. 3701 is shown in Table 1. The costs of the legislation fall within budget function 370 (commerce and housing credit).

	By fiscal year, millions of dollars—												
	2020	2021	2022	2023	2024	2025	2026	2027	2025	2029	2030	2020– 2025	2020– 2030
Increases in Revenues													
Estimated Revenues	30	140	140	70	50	50	50	50	50	50	50	450	730
Increases in Direct Spending													
Estimated Budget Authority	1	15	35	32	12	12	12	12	12	12	12	106	164
Estimated Outlays	1	15	35	32	12	12	12	12	12	12	12	106	164
Net Decrease in the Deficit From Changes in Revenues and Direct Spending													
Effect on the Deficit	– 29	– 125	– 105	– 35	– 35	– 35	– 35	– 35	– 35	– 35	– 35	– 374	– 566

Using information from the Securities and Exchange Commission (SEC), CBO expects that the agency would require additional staff to prosecute additional cases brought under the bill. However, the SEC is authorized to collect fees each year sufficient to offset its annual appropriation. Assuming appropriation actions consistent with that authority, CBO estimates that any net change in discretionary spending would be negligible.

Basis of estimate: CBO assumes that H.R. 3701 will be enacted in 2020.

Revenues: CBO anticipates that extending the statute of limitations to 10 years under H.R. 3701 would lead the SEC to prosecute some cases against securities law violators that it cannot prosecute under current law. As a result, CBO expects that the SEC would order and collect additional civil monetary penalties.

CBO treats collections of civil monetary penalties as revenues in the federal budget. Using data from the SEC about penalties collected in recent years, CBO estimates that enacting H.R. 3701 would increase the collection of civil monetary penalties, and thus revenues, by \$730 million over the 2020–2030 period.

Direct spending: Section 305 of the Sarbanes-Oxley Act, known as the Fair Fund provision, authorizes the SEC to distribute civil monetary penalties to harmed investors. For this cost estimate, CBO has displayed distributions of additional revenues as direct spending. Based on distribution patterns from enforcement actions in recent years, CBO estimates that H.R. 3701 would increase outlays by \$140 million over the 2020–2030 period.

In addition, the SEC provides monetary awards to whistleblowers who report violations that lead to judicial or administrative enforcement actions yielding more than \$1 million in penalties. Whistleblowers are eligible to receive between 10 percent and 30 percent of any penalties that would be ordered and collected. CBO expects that a small portion of the additional cases brought under H.R. 3701 would stem from whistleblower information. CBO estimates that over the 2020–2030 period, the SEC would pay \$24 million in additional whistleblower awards, which are recorded as direct spending in the federal budget.

In total, CBO expects that enacting H.R. 3701 would increase direct spending by about \$164 million over the 2020–2030 period.

Uncertainty: Because the amount of penalties that the SEC orders, collects, and distributes from securities law violations is hard to predict and varies from year to year, estimating the budgetary effects of H.R. 3701 is uncertain; collections could be higher or lower than CBO estimates. Several other factors also could affect the estimated change in revenues under the bill, including the number of additional cases the SEC would pursue under the lengthened statute of limitations, the amounts collected in civil penalties, and how much the SEC would return to harmed investors. In addition, because the amount and timing of payments to whistleblowers depends on factors such as the number of whistleblowers and the size of awards each year, all of which are hard to predict, the total amounts could be higher or lower than CBO estimates.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in outlays and revenues that are subject to those pay-as-you-go procedures are shown in Table 2.

Increase in long-term deficits: None.

Mandates: If the SEC increased fees to offset the costs associated with implementing the bill, H.R. 3701 would increase the cost of an existing mandate on private entities required to pay those fees. CBO estimates that the incremental cost of the mandate would be below the annual threshold established in the Unfunded Mandates Reform Act (UMRA) for private-sector mandates (\$165 million in 2020, adjusted annually for inflation).

The bill contains no intergovernmental mandates as defined in UMRA.

Estimate prepared by: Revenues: Nathaniel Frentz, Direct Spending; David Hughes, Mandates: Rachel Austin.

Estimate reviewed by: Joshua Shakin, Chief, Revenue Estimating Unit; John McClelland, Director of Tax Analysis; Susan Willie, Chief, Public and Private Mandates Unit; Kim Cawley, Chief, Natural and Physical Resources Cost Estimates Unit; H. Samuel Papenfuss, Deputy Director of Budget Analysis; Theresa Gullo, Director of Budget Analysis.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 3701. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the *Congressional Budget Act*.

UNFUNDED MANDATE STATEMENT

Pursuant to Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, Pub. L. 104–4), the Committee adopts as its own the estimate of federal mandates regarding H.R. 3701, as amended, prepared by the Director of the Congressional Budget Office.

ADVISORY COMMITTEE

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Pursuant to section 102(b)(3) of the Congressional Accountability Act, Pub. L. No. 104–1, H.R. 3701, as amended, does not apply to terms and conditions of employment or to access to public services or accommodations within the legislative branch.

EARMARK STATEMENT

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3701 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as described in clauses 9(e), 9(f), and 9(g) of rule XXI.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of H.R. 3701 establishes or reauthorizes a program of the Federal Government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

CHANGES TO EXISTING LAW

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 3701, as reported, are shown as follows:

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

SECURITIES EXCHANGE ACT OF 1934

TITLE I—REGULATION OF SECURITIES EXCHANGES

* * * * *

INVESTIGATIONS; INJUNCTIONS AND PROSECUTION OF OFFENSES

SEC. 21. (a)(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this title, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper

to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this title, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates.

(2) On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States.

(b) For the purpose of any such investigation, or any other proceeding under this title, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or both.

(d)(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this title, the rules or regula-

tions thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this title or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

(2) **AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM SERVING AS OFFICERS AND DIRECTORS.**—In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 10(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12 of this title or that is required to file reports pursuant to section 15(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

(3) **MONEY PENALTIES IN CIVIL ACTIONS.**—

(A) **AUTHORITY OF COMMISSION.**—Whenever it shall appear to the Commission that any person has violated any provision of this title, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 21C of this title, other than by committing a violation subject to a penalty pursuant to section 21A, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(B) **AMOUNT OF PENALTY.**—

(i) **FIRST TIER.**—The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) \$5,000 for a natural person or \$50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.

(ii) **SECOND TIER.**—Notwithstanding clause (i), the amount of penalty for each such violation shall not exceed the greater of (I) \$50,000 for a natural person or \$250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(iii) THIRD TIER.—Notwithstanding clauses (i) and (ii), the amount of penalty for each such violation shall not exceed the greater of (I) \$100,000 for a natural person or \$500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(C) PROCEDURES FOR COLLECTION.—

(i) PAYMENT OF PENALTY TO TREASURY.—A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 308 of the Sarbanes-Oxley Act of 2002 and section 21F of this title.

(ii) COLLECTION OF PENALTIES.—If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(iii) REMEDY NOT EXCLUSIVE.—The actions authorized by this paragraph may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(iv) JURISDICTION AND VENUE.—For purposes of section 27 of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this title.

(D) SPECIAL PROVISIONS RELATING TO A VIOLATION OF A CEASE-AND-DESIST ORDER.—In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 21C, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with the order, each day of the failure to comply shall be deemed a separate offense.

(4) PROHIBITION OF ATTORNEYS' FEES PAID FROM COMMISSION DISGORGEMENT FUNDS.—Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

(5) EQUITABLE RELIEF.—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.

(6) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM PARTICIPATING IN AN OFFERING OF PENNY STOCK.—

(A) IN GENERAL.—In any proceeding under paragraph (1) against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

(B) DEFINITION.—For purposes of this paragraph, the term “person participating in an offering of penny stock” includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.

(e) Upon application of the Commission the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding (1) any person to comply with the provisions of this title, the rules, regulations, and orders thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, the rules of the Municipal Securities Rulemaking Board, or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, (2) any national securities exchange or registered securities association to enforce compliance by its members and persons associated with its members with the provisions of this title, the rules, regulations, and orders thereunder, and the rules of such exchange or association, or (3) any registered clearing agency to enforce compliance by its participants with the provisions of the rules of such clearing agency.

(f) Notwithstanding any other provision of this title, the Commission shall not bring any action pursuant to subsection (d) or (e) of this section against any person for violation of, or to command compliance with, the rules of a self-regulatory organization or the Public Company Accounting Oversight Board unless it appears to the Commission that (1) such self-regulatory organization or the Public Company Accounting Oversight Board is unable or unwilling to take appropriate action against such person in the public interest and for the protection of investors, or (2) such action is otherwise necessary or appropriate in the public interest or for the protection of investors.

(g) Notwithstanding the provisions of section 1407(a) of title 28, United States Code, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

(h)(1) The Right to Financial Privacy Act of 1978 shall apply with respect to the Commission, except as otherwise provided in this subsection.

(2) Notwithstanding section 1105 or 1107 of the Right to Financial Privacy Act of 1978, the Commission may have access to and obtain copies of, or the information contained in financial records of a customer from a financial institution without prior notice to the customer upon an ex parte showing to an appropriate United States district court that the Commission seeks such financial records pursuant to a subpoena issued in conformity with the requirements of section 19(b) of the Securities Act of 1933, section 21(b) of the Securities Exchange Act of 1934, section 42(b) of the Investment Company Act of 1940, or section 209(b) of the Investment Advisers Act of 1940, and that the Commission has reason to believe that—

(A) delay in obtaining access to such financial records, or the required notice, will result in—

- (i) flight from prosecution;
- (ii) destruction of or tampering with evidence;
- (iii) transfer of assets or records outside the territorial limits of the United States;
- (iv) improper conversion of investor assets; or
- (v) impeding the ability of the Commission to identify or trace the source or disposition of funds involved in any securities transaction;

(B) such financial records are necessary to identify or trace the record or beneficial ownership interest in any security;

(C) the acts, practices or course of conduct under investigation involve—

- (i) the dissemination of materially false or misleading information concerning any security, issuer, or market, or the failure to make disclosures required under the securities laws, which remain uncorrected; or
- (ii) a financial loss to investors or other persons protected under the securities laws which remains substantially uncompensated; or

(D) the acts, practices or course of conduct under investigation—

- (i) involve significant financial speculation in securities;
- or
- (ii) endanger the stability of any financial or investment intermediary.

(3) Any application under paragraph (2) for a delay in notice shall be made with reasonable specificity.

(4)(A) Upon a showing described in paragraph (2), the presiding judge or magistrate shall enter an ex parte order granting the requested delay for a period not to exceed ninety days and an order prohibiting the financial institution involved from disclosing that records have been obtained or that a request for records has been made.

(B) Extensions of the period of delay of notice provided in subparagraph (A) of up to ninety days each may be granted by the court upon application, but only in accordance with this subsection or section 1109(a), (b)(1), or (b)(2) of the Right to Financial Privacy Act of 1978.

(C) Upon expiration of the period of delay of notification ordered under subparagraph (A) or (B), the customer shall be served with or mailed a copy of the subpoena insofar as it applies to the customer together with the following notice which shall describe with reasonable specificity the nature of the investigation for which the Commission sought the financial records:

* * * * *

(5) Upon application by the Commission, all proceedings pursuant to paragraphs (2) and (4) shall be held in camera and the records thereof sealed until expiration of the period of delay or such other date as the presiding judge or magistrate may permit.

(7)(A) Following the expiration of the period of delay of notification ordered by the court pursuant to paragraph (4) of this subsection, the customer may, upon motion, reopen the proceeding in the district court which issued the order. If the presiding judge or magistrate finds that the movant is the customer to whom the records obtained by the Commission pertain, and that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), it may order that the customer be granted civil penalties against the Commission in an amount equal to the sum of—

- (i) \$100 without regard to the volume of records involved;
- (ii) any out-of-pocket damages sustained by the customer as a direct result of the disclosure; and
- (iii) if the violation is found to have been willful, intentional, and without good faith, such punitive damages as the court may allow, together with the costs of the action and reasonable attorney's fees as determined by the court.

(B) Upon a finding that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), the court, in its discretion, may also or in the alternative issue injunctive relief to require the Commission to comply with this subsection with respect to any subpoena which the Commission issues in the future for financial records of such customer for purposes of the same investigation.

(C) Whenever the court determines that the Commission has failed to comply with this subsection, other than paragraph (1), and the court finds that the circumstances raise questions of whether an officer or employee of the Commission acted in a willful and intentional manner and without good faith with respect to the violation, the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. After investigating and considering the evidence submitted, the Office of Personnel Management shall submit its findings and recommendations to the Commission and shall send copies of the findings and recommendations to the officer or employee or his representative. The Commission shall take the corrective action that the Office of Personnel Management recommends.

(8) The relief described in paragraphs (7) and (10) shall be the only remedies or sanctions available to a customer for a violation of this subsection, other than paragraph (1), and nothing herein or in the Right to Financial Privacy Act of 1978 shall be deemed to prohibit the use in any investigation or proceeding of financial records, or the information contained therein, obtained by a sub-

pena issued by the Commission. In the case of an unsuccessful action under paragraph (7), the court shall award the costs of the action and attorney's fees to the Commission if the presiding judge or magistrate finds that the customer's claims were made in bad faith.

(9)(A) The Commission may transfer financial records or the information contained therein to any government authority if the Commission proceeds as a transferring agency in accordance with section 1112 of the Right to Financial Privacy Act of 1978, except that the customer notice required under section 1112(b) or (c) of such Act may be delayed upon a showing by the Commission, in accordance with the procedure set forth in paragraphs (4) and (5), that one or more of subparagraphs (A) through (D) of paragraph (2) apply.

(B) The Commission may, without notice to the customer pursuant to section 1112 of the Right to Financial Privacy Act of 1978, transfer financial records or the information contained therein to a State securities agency or to the Department of Justice. Financial records or information transferred by the Commission to the Department of Justice or to a State securities agency pursuant to the provisions of this subparagraph may be disclosed or used only in an administrative, civil, or criminal action or investigation by the Department of Justice or the State securities agency which arises out of or relates to the acts, practices, or courses of conduct investigated by the Commission, except that if the Department of Justice or the State securities agency determines that the information should be disclosed or used for any other purpose, it may do so if it notifies the customer, except as otherwise provided in the Right to Financial Privacy Act of 1978, within 30 days of its determination, or complies with the requirements of section 1109 of such Act regarding delay of notice.

(10) Any government authority violating paragraph (9) shall be subject to the procedures and penalties applicable to the Commission under paragraph (7)(A) with respect to a violation by the Commission in obtaining financial records.

(11) Notwithstanding the provisions of this subsection, the Commission may obtain financial records from a financial institution or transfer such records in accordance with provisions of the Right to Financial Privacy Act of 1978.

(12) Nothing in this subsection shall enlarge or restrict any rights of a financial institution to challenge requests for records made by the Commission under existing law. Nothing in this subsection shall entitle a customer to assert any rights of a financial institution.

(13) Unless the context otherwise requires, all terms defined in the Right to Financial Privacy Act of 1978 which are common to this subsection shall have the same meaning as in such Act.

(i) INFORMATION TO CFTC.—The Commission shall provide the Commodity Futures Trading Commission with notice of the commencement of any proceeding and a copy of any order entered by the Commission against any broker or dealer registered pursuant to section 15(b)(11), any exchange registered pursuant to section 6(g), or any national securities association registered pursuant to section 15A(k).

(j) *STATUTE OF LIMITATIONS.*—

(1) *CIVIL MONETARY PENALTIES.*—

(A) *IN GENERAL.*—An action or proceeding brought or instituted by the Commission under any provision of the securities laws for a civil monetary penalty may be brought not later than 10 years after the alleged violation.

(B) *EXCLUSION.*—The period of limitations in subparagraph (A) does not run during any time when an alleged violator is absent from the United States or has no reasonably ascertainable place of abode or work within the United States.

(2) *DEFINITION.*—For purposes of this subsection, the term “civil monetary penalty” means relief sought by the Commission under—

(A) subsection (d)(3), section 10A(d), section 21A(a), section 21B(a), or subsection (b), (c)(1)(B), or (c)(2)(B) of section 32 (15 U.S.C. 78j-1(d), 78u-2(a), 78ff(b), 78ff(c)(1)(B), or 78ff(c)(2)(B));

(B) section 8A(g)(2) or section 20(d)(2) of the Securities Act of 1933 (15 U.S.C. 77h-1(g)(2), 77t(d)(2));

(C) section 9(d)(1) or 42(e)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a-9(d)(1), 80a-41(e)(1));

(D) section 203(i)(1) or 209(e)(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(i)(1), 80b-9(e)(1)); or

(E) section 304(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7243(a)).

CIVIL PENALTIES FOR INSIDER TRADING

SEC. 21A. (a) *AUTHORITY TO IMPOSE CIVIL PENALTIES.*—

(1) *JUDICIAL ACTIONS BY COMMISSION AUTHORIZED.*—Whenever it shall appear to the Commission that any person has violated any provision of this title or the rules or regulations thereunder by purchasing or selling a security or security-based swap agreement while in possession of material, non-public information in, or has violated any such provision by communicating such information in connection with, a transaction on or through the facilities of a national securities exchange or from or through a broker or dealer, and which is not part of a public offering by an issuer of securities other than standardized options or security futures products, the Commission—

(A) may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by the person who committed such violation; and

(B) may, subject to subsection (b)(1), bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by a person who, at the time of the violation, directly or indirectly controlled the person who committed such violation.

(2) *AMOUNT OF PENALTY FOR PERSON WHO COMMITTED VIOLATION.*—The amount of the penalty which may be imposed on the person who committed such violation shall be determined by the court in light of the facts and circumstances, but shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase, sale, or communication.

(3) AMOUNT OF PENALTY FOR CONTROLLING PERSON.—The amount of the penalty which may be imposed on any person who, at the time of the violation, directly or indirectly controlled the person who committed such violation, shall be determined by the court in light of the facts and circumstances, but shall not exceed the greater of \$1,000,000, or three times the amount of the profit gained or loss avoided as a result of such controlled person's violation. If such controlled person's violation was a violation by communication, the profit gained or loss avoided as a result of the violation shall, for purposes of this paragraph only, be deemed to be limited to the profit gained or loss avoided by the person or persons to whom the controlled person directed such communication.

(b) LIMITATIONS ON LIABILITY.—

(1) LIABILITY OF CONTROLLING PERSONS.—No controlling person shall be subject to a penalty under subsection (a)(1)(B) unless the Commission establishes that—

(A) such controlling person knew or recklessly disregarded the fact that such controlled person was likely to engage in the act or acts constituting the violation and failed to take appropriate steps to prevent such act or acts before they occurred; or

(B) such controlling person knowingly or recklessly failed to establish, maintain, or enforce any policy or procedure required under section 15(f) of this title or section 204A of the Investment Advisers Act of 1940 and such failure substantially contributed to or permitted the occurrence of the act or acts constituting the violation.

(2) ADDITIONAL RESTRICTIONS ON LIABILITY.—No person shall be subject to a penalty under subsection (a) solely by reason of employing another person who is subject to a penalty under such subsection, unless such employing person is liable as a controlling person under paragraph (1) of this subsection. Section 20(a) of this title shall not apply to actions under subsection (a) of this section.

(c) AUTHORITY OF COMMISSION.—the Commission, by such rules, regulations, and orders as it considers necessary or appropriate in the public interest or for the protection of investors, may exempt, in whole or in part, either unconditionally or upon specific terms and conditions, any person or transaction or class of persons or transactions from this section.

(d) PROCEDURES FOR COLLECTION.—

(1) PAYMENT OF PENALTY TO TREASURY.—A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 308 of the Sarbanes-Oxley Act of 2002 and section 21F of this title.

(2) COLLECTION OF PENALTIES.—If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(3) REMEDY NOT EXCLUSIVE.—The actions authorized by this section may be brought in addition to any other actions that the Commission or the Attorney General are entitled to bring.

(4) JURISDICTION AND VENUE.—For purposes of section 27 of this title, actions under this section shall be actions to enforce a liability or a duty created by this title.

[(5) STATUTE OF LIMITATIONS.—No action may be brought under this section more than 5 years after the date of the purchase or sale. This section shall not be construed to bar or limit in any manner any action by the Commission or the Attorney General under any other provision of this title, nor shall it bar or limit in any manner any action to recover penalties, or to seek any other order regarding penalties, imposed in an action commenced within 5 years of such transaction.]

(e) DEFINITION.—For purposes of this section, “profit gained” or “loss avoided” is the difference between the purchase or sale price of the security and the value of that security as measured by the trading price of the security a reasonable period after public dissemination of the nonpublic information.

(f) The authority of the Commission under this section with respect to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) shall be subject to the restrictions and limitations of section 3A(b) of this title.

(g) DUTY OF MEMBERS AND EMPLOYEES OF CONGRESS.—

(1) IN GENERAL.—Subject to the rule of construction under section 10 of the STOCK Act and solely for purposes of the insider trading prohibitions arising under this Act, including section 10(b) and Rule 10b–5 thereunder, each Member of Congress or employee of Congress owes a duty arising from a relationship of trust and confidence to the Congress, the United States Government, and the citizens of the United States with respect to material, nonpublic information derived from such person’s position as a Member of Congress or employee of Congress or gained from the performance of such person’s official responsibilities.

(2) DEFINITIONS.—In this subsection—

(A) the term “Member of Congress” means a member of the Senate or House of Representatives, a Delegate to the House of Representatives, and the Resident Commissioner from Puerto Rico; and

(B) the term “employee of Congress” means—

(i) any individual (other than a Member of Congress), whose compensation is disbursed by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives; and

(ii) any other officer or employee of the legislative branch (as defined in section 109(11) of the Ethics in Government Act of 1978 (5 U.S.C. App. 109(11))).

(3) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to impair or limit the construction of the existing antifraud provisions of the securities laws or the authority of the Commission under those provisions.

(h) DUTY OF OTHER FEDERAL OFFICIALS.—

(1) IN GENERAL.—Subject to the rule of construction under section 10 of the STOCK Act and solely for purposes of the insider trading prohibitions arising under this Act, including section 10(b), and Rule 10b–5 thereunder, each executive branch employee, each judicial officer, and each judicial employee owes

a duty arising from a relationship of trust and confidence to the United States Government and the citizens of the United States with respect to material, nonpublic information derived from such person's position as an executive branch employee, judicial officer, or judicial employee or gained from the performance of such person's official responsibilities.

(2) DEFINITIONS.—In this subsection—

(A) the term “executive branch employee”—

(i) has the meaning given the term “employee” under section 2105 of title 5, United States Code;

(ii) includes—

(I) the President;

(II) the Vice President; and

(III) an employee of the United States Postal Service or the Postal Regulatory Commission;

(B) the term “judicial employee” has the meaning given that term in section 109(8) of the Ethics in Government Act of 1978 (5 U.S.C. App. 109(8)); and

(C) the term “judicial officer” has the meaning given that term under section 109(10) of the Ethics in Government Act of 1978 (5 U.S.C. App. 109(10)).

(3) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to impair or limit the construction of the existing antifraud provisions of the securities laws or the authority of the Commission under those provisions.

(i) PARTICIPATION IN INITIAL PUBLIC OFFERINGS.—An individual described in section 101(f) of the Ethics in Government Act of 1978 may not purchase securities that are the subject of an initial public offering (within the meaning given such term in section 12(f)(1)(G)(i)) in any manner other than is available to members of the public generally.

* * * * *

MINORITY VIEWS

H.R. 3701, *a bill to establish a statute of limitations for certain actions of the Securities and Exchange Commission, and for other purposes*, would unnecessarily extend the SEC's statute of limitations. The bill would allow the SEC to bring an action or proceeding for a civil monetary penalty for up to 10 years after the date the violation occurs. In addition, H.R. 3701 provides that the 10-year period is stayed at any time that an alleged violator of the securities laws is absent from the United States or has no reasonably ascertainable place of abode or work within the United States.

Committee Republicans support giving the SEC all necessary tools to fight fraud, prosecute wrongdoers, and uphold the rule of law. Based upon evidence presented to the Committee, however, H.R. 3701 would not provide the SEC with a necessary tool. Committee Republicans believe the SEC is already subject to an appropriate statute of limitations when seeking civil monetary penalties. Like other agencies, the SEC is subject to 25 U.S.C. § 2462, a generally applicable statute that subjects agency enforcement seeking a "civil fine, penalty, or forfeiture" to a five-year statute of limitation, unless Congress otherwise provides for a separate statute of limitations. The statute is not only applicable to SEC actions, but to *any* agency enforcement. Thus, Congress has already established what it believes is an appropriate baseline statute of limitations when seeking a fine, penalty, or forfeiture. Absent some special showing demonstrating a need to extend the timeframe, a five-year statute of limitation continues to be an appropriate timeframe.

Committee Republicans believe it's important to remind Democrats that the statute of limitations in the SEC context serves as an important procedural protection: it is intended to strike the right balance between deterring and punishing securities fraud with protecting the shareholders ultimately responsible for paying any fines or civil penalties. As time goes by, evidence necessarily becomes less reliable (*e.g.*, as time passes, evidence can grow stale and witnesses are less likely to remember crucial events accurately), which can lead to litigation with less accurate—or even unjust—results. When an action includes the threat of SEC civil penalties, the harm of any inaccurate or unjust results is even greater.

Beyond concern about stale evidence, the five-year statute of limitations has additional benefits. The current five-year statute of limitations encourages the SEC to move quickly and efficiently to initiate actions. This ensures that more appropriate cases are pursued, rather than stretching investigations over the course of a decade or longer. It could also encourage the SEC to prioritize its resources more on frauds that are more likely to harm Mom and Pop investors—*i.e.*, smaller-dollar frauds that harm retail investors, instead of spending up to a decade on a prolonged investigation of a high-profile, larger defendant in hopes of a big penalty.

With those concerns noted, Committee Republicans remain open to considering a lengthened statute of limitations if there were a demonstrated need for extending the generally applicable five-year window. However, Democrats have not provided any compelling evidence that would justify such an extension for the SEC in seeking civil monetary penalties. Further, and importantly, the SEC has not asked for such an extension. H.R. 3701 thus seems to be a solution in search of a problem.

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