

HEARING BEFORE THE SUBCOMMITTEE ON INVESTOR PROTECTION,
ENTREPRENEURSHIP, AND CAPITAL MARKETS
OF THE COMMITTEE ON FINANCIAL SERVICES
OF THE UNITED STATES HOUSE OF REPRESENTATIVES

Putting Investors First: Examining Proposals To Strengthen Enforcement Against
Securities Law Violators

Testimony of Andrew N. Vollmer

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Chairwoman Maloney, Ranking Member Huizenga, and Members of the Subcommittee:

I am pleased to have an opportunity to comment on several timely and important issues related to the enforcement of the federal securities laws. I will address (1) general principles that should guide legislation in the federal securities law area, (2) the problem of foreign businesses using the U.S. capital markets without providing investors the additional assurances of an auditor inspected by the Public Company Accounting Oversight Board, and (3) limitations periods for SEC enforcement cases, the length of SEC investigations, and relief in the form of restitution of investor loss.

I have extensive experience with the SEC enforcement process and have written about various aspects of it. A summary of my background and a list of enforcement articles are at the end of these written remarks. The views I express in this written statement and in my oral testimony are solely my own and are not on behalf of and do not necessarily reflect the views of any other person. For convenience, I will refer to a person involved in an SEC investigation or charged with a violation of the securities laws as a defendant.

General

Legislation in the federal securities area should be guided by several general principles. The leading principle is that the federal securities laws should make the United States an attractive and efficient place for raising capital for businesses large and small. Smoothing the path to capital encourages innovation, productivity, research, expansion, and economic growth. It increases the nation's wealth and personal liberty and autonomy.

A major component of the regulation of capital markets is the protection of investors. Investors need confidence in the system before they will risk their resources. They need companies to make appropriate disclosures, and they need to know that the system imposes checks on the accuracy and completeness of the information.

That leads to a third principle. Enforcement is an essential part of an effective system of securities regulation. Enforcement should be vigorous but fair. Vigorous enforcement reduces non-compliance and gives all market participants assurance that the

rules will be followed. Fair enforcement increases accuracy of results, promotes the legitimacy and acceptability of the enforcement process, fosters respect for the law, and therefore advances the statutory goals of encouraging capital formation while protecting investors and markets.

The SEC enforcement process should guard against arbitrary, abusive, and harsh enforcement provisions that over-deter beneficial economic activity. It should be based on the rule of law and should provide each defendant with adequate advance notice of specific and identifiable standards of conduct, a meaningful opportunity to prepare and present a defense, and an ability to bring cases that lack merit to a rapid close. Fairness to defendants should be one of the highest values protected by the process used to enforce the federal securities laws.

The bills you are considering should be measured against these standards. Several of the bills would not promote the aims of capital formation, economic growth, and fair enforcement, in contrast to many of the provisions in the Jobs and Investor Confidence Act passed in the House last Congress with strong bi-partisan support. These bills address the SEC enforcement process and increase the power and authority of the SEC and the enforcement staff, but they do so without adequate justification or understanding of their likely effects on market participants and capital markets. To a large extent, the enforcement bills would make securities activities in the United States more costly and would burden the capital formation process without sufficient offsetting benefits.

My written comments address PCAOB inspection of auditors and proposals to allow the SEC to recover investor loss and to extend the statute of limitations for SEC enforcement cases, but I would be pleased to answer specific question about any of the bills being considered.

Issuer auditors not subject to PCAOB inspection

Let's look at the bill to hold foreign companies accountable. The bill has a worthy objective, but the solution adopted in the bill could be more effective.

The concern of the bill is that some companies raising capital in the United States use auditors that are not inspected by the Public Company Accounting Oversight Board.¹ This is a valid concern. Our securities regulation system puts a premium on the reliability and accuracy of the financial statements in registration statements or the public filings of companies obliged to make periodic reports about their operations. A person that prepares or issues or participates in the preparation or issuance of any audit report of such an issuer must register with the PCAOB and must be subject to periodic inspections by the PCAOB. See 15 U.S.C. §§ 7212(a), 7214. Another section of the law specifically addresses PCAOB registration and regulation of a foreign public accounting firm that prepares or furnishes an audit report for a reporting company or plays a substantial role in the preparation of an audit report. *Id.* § 7216.

Before enactment of the Sarbanes-Oxley Act in 2002, a House Report directly linked the creation and function of the PCAOB to confidence in the financial statements of reporting companies. The Report said that the PCAOB was to enforce compliance by accountants with competency standards applicable to audits of financial statements required to be filed with the SEC and that the goal was to improve the accuracy and reliability of corporate disclosures under the securities laws. See Report of the House Committee on Financial Services, Rep. No. 107-414 (April 22, 2002).

A few countries do not permit PCAOB inspections of their accounting firms, and a long list of companies that are U.S. reporting companies have auditors that are not subject to inspection.² The existence of U.S. reporting companies with auditors not inspected by the PCAOB is not acceptable. It creates a two-tiered system of disclosure quality in the United States and creates doubt about the trustworthiness of the financial statements of those companies.

¹ See SEC Chairman Jay Clayton, SEC Chief Accountant Wes Bricker, and PCAOB Chairman William D. Duhnke III, Statement on the Vital Role of Audit Quality and Other Information Internationally – Discussion of Current Information Access Challenges with Respect to U.S.-listed Companies with Significant Operations in China (Dec. 7, 2018), available at <https://www.sec.gov/news/public-statement/statement-vital-role-audit-quality-and-regulatory-access-audit-and-other>.

² The PCAOB website has a list of companies with auditors not subject to PCAOB inspection. See Issuers that are Audit Clients of PCAOB-Registered Firms from Non-U.S. Jurisdictions where the PCAOB is Denied Access to Conduct Inspections, <https://pcaobus.org/International/Inspections/Pages/IssuerClientsWithoutAccess.aspx>.

The bill proposes to address the problem by instructing the SEC to prohibit the trading of a reporting company's securities on a national securities exchange or alternative trading system when the PCAOB has not been able to inspect a foreign public accounting firm retained by the issuer. The goal is to protect the U.S. capital markets from an increased risk of faulty audited financial statements.

A possible outcome of the legislation is that some foreign companies might leave the U.S. capital markets, some foreign companies might not raise capital in the U.S., and current shareholders of some foreign companies might not be able to sell their shares at all or at liquid market prices. The question is whether these disadvantages are substantial enough to tolerate use of audited financial statements when the auditor is not being inspected by the PCAOB. Welcoming foreign companies to raise capital in the United States and allowing liquidity and free trading of shares in the United States are important policies, but the disclosure system has been the heart of U.S. securities regulation since 1933 and 1934. As long as PCAOB inspection of auditors is an important part of maintaining confidence and accuracy in the financial statements of U.S. reporting companies, the obligation should be applied uniformly and consistently. U.S. investors might still be able to invest in companies that do not comply. The companies could list and trade in a foreign market. U.S. investors can buy in foreign markets, but they will know that the entire system of securities regulation is different. That would be the individual investor's choice and not the choice of U.S. policy makers.

Some will argue that advance disclosure that a company's auditor is not subject to inspection is sufficient. The people who bought, and the exchange that listed, the securities had advance notice and went ahead. Investors should be allowed to decide for themselves.

In many circumstances, that is a compelling argument, but it is not persuasive here. Disclosure that a company's auditor is not subject to inspection is not sufficient. It was not the option Congress chose, and it does not deal with the disparity between those reporting companies whose auditors are subject to PCAOB inspection and those companies whose auditors are not. A PCAOB inspection supports the reliability of all of a company's financial statement disclosures. Telling investors that the auditor is not

inspected by the PCAOB casts doubt on the entirety of the financial statements and therefore defeats the goal of providing investors with assurances that financial information is accurate and complete. An extreme example of a similar disclosure would be a large, bold statement that a company's disclosures might not be accurate, but that is not an acceptable way of complying with the federal securities laws.

The goal of the legislation therefore is sound, but the proposed solution is too narrow because the bill would prevent trading on U.S. exchanges or alternative trading systems, but the number of exchange listed companies is much smaller than the number of reporting companies. The PCAOB registration and inspection requirement applies to auditors of reporting companies. In 2016, the number of companies filing an annual report on Form 10-K was 7589. The number of Form 10-K filings gives a rough order of magnitude of reporting companies but understates the number because foreign private issuers file annual reports on Form 20-F. At the end of 2016, the number of exchange listed companies was under 4000. The remedy in the bill is limited to exchange listed companies and therefore does not match the potential problem of non-exchange listed reporting companies with an auditor not subject to PCAOB inspection.

Congress could consider two alternatives. The first is to enable the SEC to employ the section 12(j) remedy it currently uses when a reporting company fails to meet its periodic filing and disclosure requirements. These are called delinquent filing cases, and the SEC has brought around 120 of them in each of the past four fiscal years. See SEC Division of Enforcement, Annual Report for FY 2018 at 9, <https://www.sec.gov/files/enforcement-annual-report-2018.pdf>. The Commission uses section 12(j) of the Exchange Act, which authorizes the SEC to suspend or revoke the registration of a security when the issuer failed to comply with any provision of the Exchange Act or its regulations. No U.S. broker-dealer may effect a transaction in a security whose registration was revoked or suspended.

Failing to have an auditor subject to PCAOB inspection affects the quality of an issuer's disclosure in a way that is similar to an issuer's failure to meet its public filing obligations. Congress therefore could enable the SEC to use section 12(j) proceedings on a case-by-case basis to de-register an issuer's securities when the issuer has an auditor not

subject to PCAOB regulation and inspection. A statute or SEC regulation would need to make explicit that a company filing a periodic report or a registration statement with an audit report has a requirement to use an auditor subject to PCAOB inspection.

A second alternative remedy would be much more narrowly tailored to the protection of investors and would avoid at least some of the main disadvantages of a solution based on de-listing or de-registration. The main disadvantages are that de-listing or de-registration would severely restrict the ability of current shareholders of U.S. reporting companies to sell their shares unless the company developed a liquid market in another country and would discourage other foreign companies from offering securities through the U.S. markets. Some of those foreign companies would be attractive investment opportunities if the companies satisfied U.S. regulatory requirements.

This second alternative could require an issuer that has a significant part of its operations or financial results audited by an auditor not subject to PCAOB inspection to post a bond or maintain an insurance policy equal to a large amount of money, such as half of the company's market capitalization at the end of the preceding fiscal year. The amount of the bond would be available to satisfy a financial sanction imposed by the SEC or a court in an SEC enforcement proceeding or a financial judgment imposed by a court in a federal securities law case brought by a private plaintiff. The financial sanction or financial judgment would need to be based on a problem with the audited financial statements. The bond or insurance policy would need to be issued by a U.S. institution, and the proceeds would need to be accessible within the territory of the United States.

This alternative is more narrowly tailored because it would seek to protect investors in the United States from a problem connected to the absence of PCAOB inspection of audit reports while still permitting U.S. trading in the securities of the foreign companies and still permitting foreign companies to raise capital here. Investors would be protected by having access to funds in the United States to compensate for loss from a securities law violation originating with a defect in the financial statements.

A bond or insurance policy approach would still have disadvantages. The requirement would increase the cost of U.S. capital for the affected foreign companies and could deter some of them from offering securities in the U.S. markets or could cause

some foreign companies to leave the U.S. markets, which would deprive investors of the opportunity to benefit in the United States from those investments. Nonetheless, a bond or insurance policy requirement would be a less restrictive solution than a prohibition on trading in the United States.

The bill has various drafting issues that should be addressed. The provisions should apply when a person with an auditor not subject to PCAOB inspection uses an American Depositary Share program of some sort. The provisions also should apply when a foreign public accounting firm not subject to PCAOB inspection plays a substantial role in the preparation and furnishing of an audit report.

Limitations periods, disgorgement, investor loss, and the length of investigations

Several bills seek to address the Supreme Court decision in *SEC v. Kokesh*, 137 S. Ct. 1635 (2017). These bills would upend the traditional reliance on a combination of private and public enforcement of the federal securities laws, leading to unpredictable disruption, and would inject arbitrariness and unfairness into the enforcement system. The result would be to increase the cost of raising capital in the United States and impede economic growth.

These written comments are limited to two features of the proposals. First is the proposal to allow the SEC to recover investor loss. Second is the proposal to abolish or extend the statute of limitations for certain forms of relief in SEC enforcement cases.

Investor loss

A bill we are considering and a bill in the Senate would authorize the SEC to recover investor loss in an enforcement case. The bill Representative McAdams introduced would allow the SEC to seek and a federal court to grant any equitable relief, including “restitution to investors in amounts equal to the amount of loss to such investors.” The bill in the Senate, S. 799, would authorize the SEC to recover “restitution to an investor in the amount of the loss that the investor sustained as a result of a violation” by a registered person.

These provisions would be unprecedented in the federal securities laws. Congress has never given the SEC power to calculate a monetary recovery in an enforcement case

based on investor loss or damage.³ Congress has given the SEC many different forms of relief, but they have all related to prevention and deterrence, such as injunctions, civil penalties, and revocation of a person's registration as a broker-dealer or investment adviser. Private actions recover compensation for loss, but private actions provide a defendant with a variety of procedural protections not available in SEC enforcement cases. Those protections include the plaintiff's need to prove reliance, loss, and loss causation, to meet higher pleading standards, and to sue within strict statutes of limitations. Since the creation of the federal securities laws in 1933 and 1934, Congress has retained private enforcement and kept the public enforcement system different. Granting the SEC the power to sue for compensation for investor damage would be a sharp break from this long-standing system.

The natural and inevitable result of giving the SEC the power to sue for investor loss would be that the agency would bring the cases with the largest dollar amount of loss. Those cases would likely be important claims to bring, but having the SEC initiate and litigate them probably would not be an efficient allocation of resources. The same cases would nearly certainly be brought by plaintiffs lawyers as class actions. The plaintiffs bar has a significant incentive to sue when the potential damage award is large.⁴ Any time a private plaintiff would bring a case, the SEC would have significantly reduced reasons for doing so, and allowing the SEC to obtain the same relief as the private plaintiffs is unnecessary. Nonetheless, SEC litigation for investor loss is apt to displace private litigation in some circumstances and to cause unpredictable disruption to the public-private enforcement regime.

A secondary effect would likely be that cases for large investor loss would come to dominate the time and resources of the Division of Enforcement. They are prominent cases and attract headlines, and they often have large, complicated sets of facts. The SEC

³ See Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 *Bus. Law.* 317 (2008).

⁴ See, e.g., Randall Thomas & James D. Cox, *Mapping the American Shareholder Experience: A Survey of Empirical Studies of the Enforcement of the U.S. Securities Law*, 6 *Euro. Co. & Fin. L. Rev.* 164 (2010); James D. Cox & Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry* 53 *Duke L.J.* 737, 749, 764 (2003).

would need to have the resources to distribute recovered funds to injured investors. If investor loss cases began to account for a significant part of the docket of the Division of Enforcement, the remaining SEC enforcement agenda would suffer. The SEC Division of Enforcement has a broad mandate to cover all requirements under the federal securities laws, including public offering cases, private offering cases, insider trading cases, broker-dealer violations, mutual fund violations, and investment adviser violations. The legislation could alter the incentives and allocation of resources to pursue problems in more technical and lower profile areas.

The need to give the SEC the authority to sue for investor loss is questionable for another reason. In many cases, such as violations in securities offerings, investor loss equals gain to the defendant, and the SEC has authority to require defendants to disgorge ill-gotten gains.⁵ In any case in which defendant gain is approximately the same as investor loss, the power to obtain disgorgement and the power to sue for investor loss would be largely duplicative and the ability to recover investor loss would be superfluous.

Statute of limitations

The second topic to address in the bills related to *Kokesh* is the extension of the statute of limitations for SEC enforcement cases. The bill introduced by Representative Gonzalez would give the SEC ten years to seek civil monetary penalties, as opposed to the current five-year period in 28 U.S.C. § 2462, and the bill of Representative McAdams would completely eliminate a limitations period for SEC claims for investor loss, disgorgement, or any other remedy deemed to be equitable.

Congress should not extend the statute of limitations for any type of relief in an SEC enforcement case. Giving the SEC significantly more time to bring enforcement cases would frustrate the compelling social interests that legislatures have recognized for centuries by enacting limitations periods. A further concern is that a longer statute of limitations for the SEC would cause further delay in what are already long and damaging SEC investigations. All too often, SEC cases are initiated years after a violation has

⁵ See 15 U.S.C. § 78u-2(e); Donna M. Nagy, *The Statutory Authority for Court-Ordered Disgorgement in SEC Enforcement Actions*, 71 S.M.U. L. Rev. 895 (2018).

occurred not because the SEC was unaware of a problem but because the investigation took too long or the staff had notice of possible misconduct and failed to look into it promptly and carefully.

Limitations periods serve weighty social interests. A federal cause of action "brought at any distance of time" is "utterly repugnant to the genius of our laws." *Adams v. Woods*, 2 Cranch 336, 342 (1805). "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). Important public policies lie at their foundation: "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). As time goes by, evidence becomes less reliable, and the results of investigations and litigation become less accurate. "Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985). See also *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013).

Congress therefore should not extend or remove a statute of limitations lightly. It should have strong reasons for giving the SEC more time to seek certain forms of relief. The claim is that SEC Enforcement is hobbled "as a result of Ponzi schemes and similar long-running, well-concealed frauds that are perpetrated by smooth talking 'investment professionals,'"⁶ but that is not the full picture. Many examples show that the SEC commences an enforcement case years after a violation occurred because it failed to investigate in a timely way after learning that a violation might be occurring. The problem in many instances is not that the SEC lacked a sufficient basis to look into possible misconduct.

⁶ SEC Chairman Jay Clayton, Keynote Remarks at the Mid-Atlantic Regional Conference (June 4, 2019), https://www.sec.gov/news/speech/clayton-keynote-mid-atlantic-regional-conference-2019#_ednref8. See also SEC Chairman Jay Clayton, Testimony before the Financial Services Committee of the House of Representatives (June 21, 2018) (referring to "clever fraudsters" and a fraud that "is well-concealed and stretches beyond the five-year limitations period"), <https://www.sec.gov/news/testimony/testimony-oversight-us-securities-and-exchange-commission>.

Take the Madoff and Stanford cases as examples. These two incidents are cited as support for a longer statute of limitations,⁷ yet in both the SEC had information about problems years before launching serious inquiries. In the Madoff case, the SEC OIG found that

the SEC received more than ample information in the form of detailed and substantive complaints over the years to warrant a thorough and comprehensive examination and/or investigation of Bernard Madoff and BMIS for operating a Ponzi scheme, and that despite three examinations and two investigations being conducted, a thorough and competent investigation or examination was never performed. The OIG found that between June 1992 and December 2008 when Madoff confessed, the SEC received six substantive complaints that raised significant red flags concerning Madoff's hedge fund operations and should have led to questions about whether Madoff was actually engaged in trading.⁸

In the Stanford case, the SEC OIG found that “the SEC’s Fort Worth office was aware since 1997 that Robert Allen Stanford was likely operating a Ponzi scheme, having come to that conclusion a mere two years after” Stanford’s investment adviser registered with the SEC. Over the next 8 years, the SEC’s Fort Worth Examination group conducted four examinations of Stanford’s operations, “concluding in each case that Stanford’s CDs were likely a Ponzi scheme or a similar fraudulent scheme.” “While the Fort Worth Examination group made multiple efforts after each examination to convince the Fort Worth Enforcement program ... to open and conduct an investigation of Stanford, no meaningful effort was made by Enforcement to investigate the potential fraud or to bring an action to attempt to stop it until late 2005.”⁹ Other examples exist of

⁷ Senators Warner and Kennedy referred to Madoff and Stanford in their statement about the introduction of a bill to extend the statute of limitations for SEC enforcement cases. <https://www.warner.senate.gov/public/index.cfm/2019/3/warner-kennedy-introduce-bill-to-help-investors-harmed-by-fraud>.

⁸ SEC OIG, Investigation of Failure of the SEC To Uncover Bernard Madoff’s Ponzi Scheme 20-21 (August 31, 2009) (footnote omitted), <https://www.sec.gov/about/offices/oig/reports/investigations/2009/oig-509.pdf>.

⁹ SEC OIG, Investigation of the SEC’s Response to Concerns Regarding Robert Allen Stanford’s Alleged Ponzi Scheme 16 (March 31, 2010), <https://www.sec.gov/about/offices/oig/reports/investigations/2010/oig-526.pdf>.

long delays between the time SEC staff learned of potential misconduct and the time the SEC brought an enforcement case.¹⁰

Another reason to be cautious about extending the limitations period for SEC enforcement cases is that SEC investigations frequently take too long, and the existence of a reasonable statute of limitations acts as an incentive for the SEC staff to complete or close investigations. A major concern about the SEC enforcement process is with the length of investigations. I discussed this issue in earlier publications.¹¹ Long investigations contribute to the social evils meant to be resolved with statutes of limitations but also create an additional set of harms. Long investigations create uncertainty, which can lead businesses to fail or postpone research and investment in potentially beneficial goods and services. Individuals suffer. They can be fired or put on administrative leave during investigations even when no misconduct occurred. The existence of an investigation can become public, injuring reputations and causing investors to withdraw money and customers to abandon a company. The longer an investigation, the worse these problems are.

In my experience, the length of SEC investigations is strongly correlated to the five-year limitations period for fines, penalties, and forfeitures in 28 U.S.C. § 2462. The Commission and the staff have an incentive to complete investigations in time to commence enforcement proceedings before the five-year statute of limitations for monetary penalties and disgorgement expires. The limitations period thus has the salutary consequence of driving the staff to shorten investigations, although a five-year period could not really be considered unduly short.

¹⁰ SEC OIG, Failure to Timely Investigate Allegations of Financial Fraud (February 26, 2010), <https://www.sec.gov/about/offices/oig/reports/investigations/2010/oig-505.pdf>; SEC OIG, Investigation of the Failure of the SEC's Los Angeles Regional Office to Uncover Fraud in Westridge Capital Management Notwithstanding Investment Adviser Examination Conducted in 2005 and Inappropriate Conduct on the Part of Senior Los Angeles Official (October 26, 2010), <https://www.sec.gov/about/offices/oig/reports/investigations/2010/oig-533.pdf>.

¹¹ Andrew N. Vollmer, Four Ways To Improve SEC Enforcement, 43 Sec. Reg. L.J. 333, 342-43 (2015); Andrew N. Vollmer, Need for Narrower Subpoenas in SEC Investigations, New York Law Journal 4, 9 (October 9, 2014). See, e.g., SEC v. Graham, 21 F. Supp. 3d 1300, 1303 (S.D. Fla. 2014) (“The SEC investigated the case for at least seven years.”), aff’d in part, rev’d in part, and remanded, 823 F.3d 1357 (11th Cir. 2016).

The end of the five-year limitations period is not always sufficient to cause the SEC staff to reach a conclusion about the matter under investigation. The staff of the Division of Enforcement often avoids the effect of the limitations period by entering into one or more tolling agreements. In a tolling agreement, the person being investigated agrees with the staff to suspend the running of time for purposes of calculating any limitations period. See SEC Division of Enforcement, Enforcement Manual 3.1.2 (November 28, 2017). The use of tolling agreements permits the SEC to begin enforcement actions based on alleged misconduct many years old.

Extending the current five-year limitations period would only worsen all these problems. A longer limitations period is likely to lead to longer and longer investigations. A ten-year period seems inordinately long given the catalogue of ills from lengthy investigations and litigation based on old conduct.

A way to achieve real benefits in this area is to reform the SEC enforcement system. The SEC should improve its procedures for discovering serious securities law problems earlier, and it can and should take steps to shorten the length of investigations.¹²

Perhaps some categories of cases, such as FCPA cases, have features that make the current five-year limitations period not sufficient for an effective enforcement program. If Congress receives convincing data that the five-year period prevents obtaining effective relief in certain types of cases, the better approach would be to define a few specific and narrow exceptions from the five-year period. The SEC does not need blanket authority for longer investigations to deal with special circumstances. A rule could be crafted to give the SEC longer time periods in exceptional cases. For example, a provision to grant the SEC extra time could require the SEC to prove that a case involved serious and widespread misconduct and that the SEC could not reasonably have commenced an action within five years after the alleged violation.

Congress also should address additional matters if it is inclined to reconsider the limitations period for SEC cases. First, a limitations period should apply to the power of

¹² See Andrew N. Vollmer, *Four Ways To Improve SEC Enforcement*, 43 *Sec. Reg. L.J.* 333, 342-43 (2015); Andrew N. Vollmer, *Need for Narrower Subpoenas in SEC Investigations*, *New York Law Journal* 4, 9 (October 9, 2014).

the SEC to commence an enforcement case and should not apply to any particular form of relief. The statute of limitations should not be tied to fines, disgorgement, restitution, injunctions, or other relief. That is how section 2462 operates now, but that statute is difficult to interpret and does not easily apply to SEC enforcement cases. The expiration of a limitations period should stop the SEC from suing.

Second, a limitations period should apply to SEC enforcement cases brought in district court or as administrative proceedings. The litany of social harms from long investigations and ancient misconduct exists no matter what forum the SEC uses.

Third, a new statute of limitations should restrict and control tolling agreements. The staff currently uses them to prolong the five-year limitations period. Congress might not want to prohibit all tolling agreements, but they should be rare.

Fourth, a limitations period should not exclude the time a defendant was outside of or absent from the United States. The exclusion would mean that no statute of limitations applies to a foreign legal entity or to many foreign individuals. The reasons to have limitations periods apply to foreign persons as well as those located in the United States. In the age of instant global communications and information and bilateral and multilateral agreements on enforcement cooperation, this provision seems anachronistic. It also would extend already long limitations periods and complicate calculations of the limitations periods.

Background

I am Professor of Law, General Faculty, and Director of the John W. Glynn, Jr. Law & Business Program at the University of Virginia School of Law. I teach Securities Regulation, Advanced Topics in Securities Regulation, and Securities Litigation and Enforcement. I was Deputy General Counsel of the Securities and Exchange Commission from mid-2006 to March 2009 and was a partner in the securities litigation and enforcement practice of Wilmer Cutler Pickering Hale and Dorr LLP before and after my time at the SEC. While at the Commission, one of my main areas of responsibility was to advise the Commissioners and the Division of Enforcement on legal aspects of contemplated enforcement proceedings. While in private law practice, I represented many individuals and companies that were in SEC investigations and private securities

litigation or that discovered potential misconduct before an investigation or private litigation began.

I have written on various aspects of the SEC enforcement process:

Accusers as Adjudicators in Agency Enforcement Proceedings, 52 U. Mich. J.L. Reform 103 (2018).

A Rule of Construction for the Personal Benefit Requirement in Tipping Cases, 11 N.Y.U. J.L. & Lib. 331 (2017).

SEC Revanchism and the Expansion of Primary Liability Under Section 17(a) and Rule 10b-5, 10 Va. L. & Bus. Rev. 273 (2016).

Computer Hacking and Securities Fraud, 47 Sec. Reg. & L. Rep. (Bloomberg BNA) 1985 (October 19, 2015).

Four Ways To Improve SEC Enforcement, 43 Sec. Reg. L.J. 333 (2015).

Need for Narrower Subpoenas in SEC Investigations, New York Law Journal 4 (October 9, 2014).

A Chance to Rein in Securities Class Actions, Wall Street Journal A17 (March 4, 2014).

Should Class Actions To Enforce Rule 10b-5 Be Expanded or Curtailed?, 44 Sec. Reg. & L. Rep. (Bloomberg BNA) 325 (2012).

How hedge fund advisers can reduce insider trading risk, 3 Journal of Securities Law, Regulation & Compliance 106 (2010).