

United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

September 13, 2019

Memorandum

To: Members of the Committee on Financial Services
From: FSC Majority Staff
Subject: September 18, 2019 Full Committee Markup

The Committee on Financial Services will meet to mark up the following measures, in an order to be determined by the Chairwoman, at 10:00 a.m. on Wednesday, September 18, 2019, and subsequent days if necessary, in room 2128 of the Rayburn House Office Building:

Amendment in the Nature of a Substitute to H.R. 123, the “Alternative Data for Additional Credit FHA Pilot Program Reauthorization Act” (Green)

Summary: This Amendment in the Nature of a Substitute (ANS) would reauthorize the Department of Housing and Urban Development’s (HUD) statutory authority to implement a pilot program under the Federal Housing Administration (FHA) to increase credit access for borrowers with thin or no credit files through the use of additional credit data. The ANS would also require HUD to report pilot program findings.

Background: The information and data traditionally used to make lending decisions and establish credit scores does not estimate the score for the 26 million consumers without a credit history or the 19 million consumers with credit histories that are too short or outdated to form a credit score, groups that are often labeled as “credit invisible” or “unscorable.”

Section 2124 of the Housing and Economic Recovery Act of 2008 (HERA) directed the Secretary of HUD to create a pilot program at FHA aimed at testing the use of additional credit data—such as history of rental or utility payments—to underwrite FHA borrowers in the hopes of including more credit invisible and unscorable borrowers. However, the statutory authority for the pilot program expired in July 2013 and the pilot program was never initiated.

The ANS would renew the authority for this pilot with greater specificity around how the program should be structured and would authorize the appropriation of \$3 million to establish the pilot program and \$1.5 million for each year thereafter to administer and maintain the five-year pilot. Specifically, the ANS directs HUD to choose one or more commercially available credit reporting models and provide FHA borrowers with the option to opt into this alternative model. The ANS also requires HUD to provide borrowers with local housing counseling information, and ultimately report on the findings of the pilot program to Congress.

Currently, borrowers who are credit invisible or unscorable can still obtain an FHA loan, if their lender goes through the manual underwriting process. However, the automated underwriting pilot program could

provide a faster and more efficient avenue that encourages more lenders to work with traditionally underserved borrowers, while testing its success in increasing access to credit. Draft legislation similar to the ANS to HR 123 was considered at a Financial Services Committee hearing on July 25, 2019 titled, “Examining the Use of Alternative Data in Underwriting and Credit Scoring to Expand Access to Credit.” The bill is supported by the National Consumer Law Center (on behalf of its low-income clients), Americans for Financial Reform, and the Center for Responsible Lending.

Amendment in the Nature of a Substitute to H.R. 132, the “North America Development Bank Improvement Act of 2019” (Cuellar)

Summary: The ANS authorizes the United States to participate in the North American Development Bank’s (NADB)’s first capital increase request in the Bank’s 25-year history, doubling the Bank’s capital base from \$3 billion to \$6 billion, split equally between the United States and Mexico. The bill also directs the U.S. government to use its seat on the NADB board to: (1) prioritize use of additional capital to fund infrastructure projects focused on wastewater treatment, water conservation, municipal solid waste and related matters, water pollution, storm water drainage, and non-point pollution; and (2) require the Bank to develop and implement efficiency improvements to streamline and accelerate these projects.

Background: The North American Development Bank is a multilateral development bank created under the auspices of the North American Free Trade Agreement (NAFTA) to address trans-boundary environmental issues along both sides—up to 62 miles north and 186 miles south—of the U.S.-Mexico border. For 25 years, NADB’s financing activities have included improving the supply of drinking water, building wastewater and hazard waste treatment facilities, reducing environmental pollutants or contaminants, improving roadways, air quality improvements and renewable energy.

- In 2018, NADB approved \$138.1 million in financing in 2018. This included \$131.7 million in loans, \$4.1 million in grants, and \$2.3 million in technical assistance.
- The sectoral breakdown of NADB’s outstanding portfolio (by volume) at the end of 2018 was wind energy (50 percent), solar energy (24 percent), water and wastewater (12 percent), air quality (10 percent), basic urban infrastructure (3 percent), and storm drainage (1 percent).
- At the end of 2018, 73 percent (53 projects) of NADB’s outstanding portfolio was in Mexico, and 27 percent (16 projects) was in the United States.¹

Despite gains made in recent decades, the United States’ border region experiences poverty rates that are double the national average, while Mexico faces ongoing security challenges and infrastructure gaps. As a tangible demonstration of the U.S. and Mexico’s shared commitment to build a stable and prosperous border region, in 2015, then-President Obama and then-Mexican President Enrique Peña Nieto committed to doubling the North American Development Bank’s capital from \$3 billion to \$6 billion over the next five years, with commitments in equal parts by the United States and Mexico.²

The NADB’s Board of Directors adopted a resolution supporting this first-ever general capital increase to double the NADB’s capital to preserve the NADB’s current lending capacity and bolster its credit rating. Both the United States and Mexico committed to providing \$225 million in paid-in capital over five years, supplemented by \$1.275 billion in callable capital from each country.³

¹ Report to Congress from the Chairman of the National Advisory Council on International Monetary and Financial Policies, U.S. Department of Treasury, March 16, 2016

² CRS, In Focus, The North American Development Bank, updated February 6, 2018

³ U.S. Department of the Treasury International Programs, Congressional Justification for Appropriations FY 2016

In written testimony before the Committee in December 2018 evaluating the effectiveness of the international financial institutions, then-Treasury Under Secretary for International Affairs David Malpass stated that the Administration was “strongly committed to enhancing growth and development within the U.S.-Mexico border region” and underscored the Administration’s strong support for the North American Development Bank. Malpass stated that Treasury Secretary Mnuchin and Mexico announced an agreement to the expand the NADB, adding that by working with our Mexican partners in the NADB, the Bank can do even more to improve infrastructure and create economic opportunities that can increase median real incomes along both sides of the border.

Earlier this year, in testimony before the Committee on April 9, 2019, Secretary Steven T. Mnuchin reiterated the Administration’s support for the NADB, noting that the President had requested in his budget an authorization for the planned share purchase in the North American Development Bank with the goal of working more closely with Mexico to improve economic conditions in our hemisphere.

Amendment in the Nature of a Substitute to H.R. 4029, the “Tribal Eligibility for Homeless Assistance Grants Act of 2019” (Heck)

Summary: This Amendment in the Nature of a Substitute (ANS) would make tribes and tribally designated housing entities eligible to receive McKinney-Vento Homeless Assistance Grant funding.

Background: A study commissioned by the Department of Housing and Urban Development (HUD) found that there are between 42,000 and 85,000 homeless Native Americans living on tribal lands.⁴ Homelessness on tribal lands often leads to families “doubling up” with neighbors, family, and friends; in fact, sixteen percent of American Indian and Alaska Native households experience overcrowding compared to only two percent of all households in the United States.⁵ While tribes receive some housing assistance through programs such as the Native American Housing Block Grant, these programs fall substantially short of meeting the affordable housing needs of tribes, and they remain ineligible to receive McKinney-Vento Homeless Assistance Grants offered by HUD.

McKinney-Vento Homeless Assistance Grants are allocated and administered through Continuums of Care (CoCs), which is a network of local or regional planning systems. Within a CoC’s jurisdiction, nonprofits, local governments, or other eligible applicants can submit funding requests for specific projects or programs through the CoC planning body. The *Tribal Eligibility for Homeless Assistance Grants Act* would make tribes and tribally designated housing entities eligible apply for funding through their local CoC.

H.R. 4029 was considered during an August full Committee field hearing that focused on the homelessness crisis in Los Angeles. This bill is supported by the Minnesota Tribal Collaborative to Prevent & End Homelessness, National Low Income Housing Coalition, National Alliance to End Homelessness and others.

⁴ U.S. Department of Housing and Urban Development | Office of Policy Development and Research. Housing Needs of American Indians and Alaska Natives in Tribal Areas: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs. Available at:

<https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf>

⁵ *Ibid*

Amendment in the Nature of a Substitute to H.R. 4067, the “Financial Inclusion in Banking Act of 2019” (Scott)

Summary: The Amendment in the Nature of a Substitute (ANS) would direct the Consumer Financial Protection Bureau’s (CFPB) Office of Community Affairs to conduct a study every two years to better address the needs of under-banked, un-banked, and underserved communities in the United States, and to lessen reliance on non-traditional banking products, like payday loans. The ANS also requires the Office of Community Affairs to coordinate with other Federal departments and agencies on the topic, and to develop strategies to increase financial education to the under-banked, unbanked and underserved consumers.

Background: Access to safe, reliable, and affordable banking services is the cornerstone of economic inclusion, providing consumers with the ability to grow their savings, build credit, and conduct financial transactions in a stable and secure way. While the benefits garnered from access to the traditional banking sector are many, they are not felt by the individuals and families outside its boundaries. A 2017 study from the Federal Deposit Insurance Corporation (FDIC) found that more than 25% of American households are either unbanked or underbanked.⁶

The FDIC defines a “fully-banked” individual as both having a traditional banking account and not using alternative financial services in the past 12 months. Conversely, “un-banked” individuals are consumers who do not have a checking or savings account; “under-banked” consumers have an account at an insured depository institution but also have utilized financial products or services outside the banking system within the past year.

A prior draft of this bill was considered during an April full Committee hearing entitled “Ending Debt Traps in the Payday and Small Dollar Credit Industry.”⁷ At the hearing, Diane Standaert, Director of State Policy at the Center for Responsible Lending testified:

Communities of color have historically been disproportionately excluded from the mainstream banking system due to discrimination. About 17% of Black and 14% of Latino households are unbanked, compared to 3% of white households... . One group of consumers has access to the mainstream financial system which is cheaper, while another is further marginalized, relegated to predatory lenders pushing costly debt trap products, reinforcing a history of financial exploitation.⁸

Amendment in the Nature of a Substitute to HR 4242, the “Greater Accountability in Pay Act of 2019” (Velazquez)

Summary: This Amendment in the Nature of a Substitute (ANS) would require public companies to disclose the pay raise percentage of its executives and the pay raise percentage of its median employee over the past year and compare each to the rate of inflation. The ANS would also require public companies to disclose the ratio between the two pay raise percentages.

⁶ FDIC, 2017 FDIC National Survey of Unbanked and Underbanked Households, (updated Oct 22, 2018).

⁷ FSC, Ending Debt Traps in the Payday and Small Dollar Credit Industry, (Apr. 30, 2019).

⁸ Diane Standaert, Testimony before FSC Regarding Ending Debt Traps in the Payday and Small Dollar Credit Industry, (Apr. 30, 2019).

Background: While CEO compensation has continued to rise, median worker wages have remained stagnant. In 1965, the average CEO was paid 20 times their median worker, rising to 58-to-1 in 1989. In 2017, this ratio reached 312-to-1.⁹ This trend is the result, in part, of workers’ wages not keeping pace with inflation, while executives have received yearly salary raises. For example, according to data from the Economic Policy Institute, the average CEO from one of the 350 largest firms received a 17.6% raise in 2017, while the typical worker in those same firms received just a 0.3% raise.¹⁰

At a May hearing before the Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets a representative for the AFL-CIO noted that “the pay ratio data that has been published since the SEC rule implementing Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act went into effect last year, has been useful to investors in analyzing companies’ compensation strategies”—an important indicator of long-term growth performance.¹¹ She noted that “additional data points in this area would further inform investor analysis.”¹² This bill is supported by the North American Securities Administrators Association (NASAA), Public Citizen, AFL-CIO, and Americans for Financial Reform.

Amendment in the Nature of a Substitute to H.R. 4300, the “Fostering Stable Housing Opportunities Act of 2019” (Dean)

Summary: This Amendment in the Nature of a Substitute (ANS) would amend the Family Unification Program (FUP) to provide FUP vouchers “on demand” to foster youth who are at risk of homelessness as they transition to adulthood, and would extend the voucher assistance for up to an additional two years if they participate in self-sufficiency activities.

Background: In Fiscal Year 2017, there were an estimated 20,000 youth across the country who were emancipated (“aged out”) from foster care.¹³ Unfortunately, these young adults are one of the most vulnerable populations at risk of falling into homelessness, as they lose access to financial, educational, and social supports that are provided through the child welfare system. Studies show that the sudden and permanent transition from foster care to adulthood is a key driver behind homelessness.¹⁴ Various studies have shown that between 11 and 36 percent of young people who age out of foster care experience homelessness.¹⁵ Other studies estimate that 25 to 50 percent of young adults who have aged out double up, couch surf, move frequently within short time periods, struggle to pay rent, or face eviction.¹⁶

⁹ Lawrence Mishel and Jessica Schieder, *CEO Compensation Surged in 2017*, Economic Policy Institute (Aug. 16, 2018), available at <https://www.epi.org/publication/ceo-compensation-surged-in-2017/>.

¹⁰ *Id.*

¹¹ Promoting Economic Growth: A Review of Proposals to Strengthen the Rights and Protections for Workers, Hearing before the Subcomm. on Investor Protection, Entrepreneurship, and Capital Markets of the H. Comm on Financial Services, 116th Cong. (2019) (statement of Heather Slavkin Corzo, Vice President of Capital Markets, AFL-CIO).

¹² *Id.*

¹³ U.S. Department of Health and Human Services, Administration for Children and Families, The AFCARS Report: Preliminary FY 2017 Estimates as of August 10, 2018-No. 25 (2018). Available at <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport25.pdf>.

¹⁴ Child Trends, *Transitioning from Foster Care: Findings from a National Survey* (2017). Available at <https://www.childtrends.org/wp-content/uploads/2017/11/SYPTFC-Findings-from-a-National-Survey-11.29.17.pdf>.

¹⁵ Mathematica Policy Research, *Housing for Youth Aging Out of Foster Care*. (2015). Available at: <https://www.mathematica-mpr.com/our-publications-and-findings/publications/housing-for-youth-aging-out-of-foster-care-in-focus-brief>.

¹⁶ U.S. Department of Housing and Urban Development, *Housing for Foster Aging Out of Foster Care* (2014). Available at https://www.huduser.gov/portal/publications/youth_hsg_main_report.pdf.

Maintaining stable housing is critical for this young population, as it helps them to complete their education and maintain employment, as well as access health and social services.

The ANS would provide Family Unification Vouchers (FUP) available “on demand” to foster youth who are at risk of homelessness as they transition to adulthood. Young adults would be able receive a FUP voucher from HUD when they age out of foster care, rather than having to wait for one to become available. This ANS would also require the public housing agency (PHA) administering the FUP voucher to extend that assistance for up to an additional 24 months if the youth either participates in HUD’s Family Self-Sufficiency program, seeks education or career development opportunities, or is employed.¹⁷ Lastly, this ANS would make foster youth eligible for various supportive services that a PHA may provide, such as transportation, child care, and financial assistance, and requires PHAs to inform youth of what services and programs they are eligible for.

Amendment in the Nature of a Substitute to H.R. 4302, the “Homeless Assistance Act of 2019” (Sherman)

Summary: This Amendment in the Nature of a Substitute (ANS) would authorize Public Housing Agencies (PHAs) to disclose relevant client information to local government entities and nonprofits in order to facilitate housing and services for individuals and families experiencing homelessness. This ANS also requires PHAs to take appropriate measures to ensure the privacy of individuals.

Background: While PHAs play a role in a local strategy to end homelessness, PHAs are limited by the Federal Privacy Act when disseminating information about their clients. PHAs can receive information on incoming homeless clients, but they must obtain written consent from each client before sharing information about a client’s housing assistance with local government entities and nonprofits. This can serve as a barrier that reduces the level of coordination between entities and requires individuals to resubmit the same information and paperwork to various entities. Research from the Pew Institute documented a reduction in the number of Veterans experiencing homelessness due to sharing and usage of data.¹⁸

The ANS would allow PHAs to share relevant client data with local government entities and nonprofits for the limited purpose of facilitating the expedited identification, assessment, and linkage of individuals experiencing homelessness to housing and supportive services.

A draft of H.R. 4302 was considered during an August full Committee field hearing that focused on the homelessness crisis in Los Angeles. This bill is supported by the Corporation for Supportive Housing and the National Coalition for the Homeless.

Amendment in the Nature of a Substitute to HR 4320, the “Corporate Management Accountability Act of 2019” (Porter)

Summary: This Amendment in the Nature of a Substitute (ANS) would require publicly traded companies to disclose their policies on whether senior executives or shareholders bear the costs of paying the company’s fines and penalties.

¹⁷ Currently FUP vouchers may be utilized by foster youth, who are 18-24 years old, for up to 36 months.

¹⁸ Pew Charitable Trust. Data Sharing Helps Reduce Number of Homeless Veterans. April 3, 2017. Available at: <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/04/data-sharing-helps-reduce-number-of-homeless-veterans>

Background: Over the past year, the SEC has focused its efforts on individual accountability. According to the SEC, “Institutions act only through their employees, and holding culpable individuals responsible for wrongdoing is essential to achieving our goals of general and specific deterrence and protecting investors by removing bad actors from our markets.”¹⁹ In FY 2018, the SEC charged individuals in more than 70% of the standalone enforcement actions it brought.²⁰ This ANS is similar to a Senate bill from last Congress (S. 1912, 115th Congress). At a June hearing before the Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, former SEC prosecutor Jordan Thomas labeled this proposal “a laudable goal,” saying that, “the required disclosure will at least have the effect of giving shareholders greater insight into issuer practices, and thereby helping them in promoting more aggressive use of clawbacks to hold management accountable.” This bill is supported by Public Citizen and the North American Securities Administrators Administration (NASAA).

Amendment in the Nature of a Substitute to H.R. 4328, the “Protecting Innocent Consumers Affected by a Shutdown Act” (Waters, Meeks, Sherman, Wexton, C. Garcia)

Summary: This Amendment in the Nature of a Substitute (ANS) would provide assistance to federal employees, contractors and other consumers negatively affected by a federal government shutdown by establishing a mechanism to identify consumers affected by a shutdown to help prevent credit reporting agencies from including any adverse financial information regarding these individuals that occurs during the shutdown or within 90 days thereafter. The ANS would also prohibit the users of consumer reports, like a financial institution or employer, from considering adverse information regarding a consumer affected by a shutdown.

Background: During the federal government shutdown of 2018–2019, the longest U.S. government shutdown in history,²¹ approximately 800,000 employees were partially or fully furloughed. Many employees found it hard to make essential housing or consumer payments when furloughed, or when being required to work without being paid.²² The Congressional Budget Office estimated the shutdown cost the American economy billions of dollars, including delaying approximately \$18 billion in federal discretionary spending for compensation and purchases of goods and services.²³

Individuals experiencing a loss of income due to a government shutdown may miss payments on debts such as mortgages, student loans, car loans, business loans, or credit cards, negatively affecting their credit scores through no fault of their own. Once negative information is reported to consumer reporting agencies, affected employees are likely to see a reduction in their credit scores, thereby negatively affecting their ability to access credit in the future or may be offered products or services on less favorable terms and conditions. This bill was considered during a February full Committee hearing entitled “Who’s Keeping Score? Holding Credit Bureaus Accountable and Repairing a Broken System.”²⁴ At the hearing, Chi Chi Wu, Staff Attorney at the National Consumer Law Center, testified:

¹⁹ 2018 Annual Report, Division of Enforcement, Securities and Exchange Commission, available at <https://www.sec.gov/files/enforcement-annual-report-2018.pdf>.

²⁰ *Id.*

²¹ Mihir Zaveri, Guilbert Gates, and Karen Zraick, The Government Shutdown Was the Longest Ever. Here’s the History, The New York Times, (Jan 25, 2019).

²² Lauriel Wamsley, How Is The Shutdown Affecting America? Let Us Count The Ways, NPR, (Jan 9, 2019).

²³ CBO, The Effects of the Partial Shutdown Ending in January 2019, (Jan 2019).

²⁴ FSC, Who’s Keeping Score? Holding Credit Bureaus Accountable and Repairing a Broken System, (Feb. 26, 2019).

The credit bureaus should be prohibited from reporting adverse information caused when the consumer is affected by economic dislocation on a mass scale, such as the recent government shutdown or a federal or state declared natural disaster. Congress must take action on this issue, as the credit bureaus have ignored or rejected requests by consumer and advocacy groups to voluntarily provide credit reporting relief to federal workers, federal contractors, and natural disaster victims.²⁵

Amendment in the Nature of a Substitute to HR 4329, the “ESG Disclosure Simplification Act of 2019” (Vargas)

Summary: This Amendment in the Nature of a Substitute (ANS) requires public companies to disclose certain environmental, social and governance (ESG) metrics, which the SEC is required to establish in a rule.²⁶ The ANS also requires public companies to disclose annually in their proxy statements a description of the company’s views on the link between ESG metrics and long-term business performance, as well as the process the issuer uses to determine such impacts. In addition, the ANS includes a sense of Congress that the ESG metrics that the SEC establishes are automatically deemed material to investors. Finally, this ANS creates a Sustainable Finance Advisory Committee within the SEC, which would make recommendations to the SEC on which ESG metrics public companies should be required to disclose; would submit a report to the SEC within 18 months that identifies challenges and opportunities for investors in sustainable finance; and would periodically recommend policy changes that would encourage the flow of capital toward sustainable finance.

Background: ESG matters generally include issues relating to environmental sustainability, such as climate change; social issues such as human rights and labor practices; and governance issues such as gender, racial, and ethnic diversity at both the executive and board levels. In recent years, investors have increasingly been demanding more — and better — disclosure of ESG information from public companies.²⁷ Many investors view ESG information as important not just for evaluating reputational risks, but for evaluating companies’ financial performance as well.²⁸ Moreover, credit rating agencies now incorporate ESG factors into their ratings methodologies.²⁹ In recognition of the growing importance of ESG disclosures in the investment landscape, the International Organization of Securities Commissions (IOSCO) published a statement on January 18, 2019 emphasizing “the importance for issuers of considering the inclusion of environmental, social and governance (ESG) matters when disclosing

²⁵ Chi Chi Wu, Testimony before FSC Hearing Regarding “Who’s Keeping Score? Holding Credit Bureaus Accountable and Repairing a Broken System,” (Feb. 26, 2019).

²⁶ The bill authorizes the SEC to delay the phase-in of these rules for small issuers.

²⁷ See e.g., Donnelly Financial, *The Future of ESG and Sustainability Reporting: What Issuers Need to Know Right Now*, at 3 (November 14, 2018) (finding that 65% of institutional investors “often or always consider environmental and social issues in their investment decisions,” and 95% “often or always consider governance issues — for all investments.”).

²⁸ See e.g., Bank of America, *ESG: Good Companies Can Make Good Stocks*, at 1 (December 18, 2016) (finding that “[ESG] metrics have been strong indicators of future volatility, earnings risk, price declines and bankruptcies.”); Nordea, *Cracking the ESG Code*, at 1 (September 5, 2017) (“Companies that score higher on ESG demonstrate better operational performance, with regards to both the level and the stability of returns.”).

²⁹ Standard & Poor’s, *How Does S&P Global Ratings Incorporate Environmental, Social, and Governance Risks Into Its Ratings Analysis*, at 2 (November 21, 2017) (noting that between July 16, 2015 and August 29, 2017, “environmental and climate (E&C) concerns affected corporate ratings in 717 cases, or approximately 10% of corporate ratings assessments and resulted in a rating impact (an upgrade, downgrade, outlook revision, or CreditWatch placement) in 106 cases.”).

information material to investors' decisions."³⁰ However, while the SEC is a member of IOSCO, it was the only member regulator not to sign on to the IOSCO statement on ESG disclosures.³¹

The Teachers Insurance and Annuity Association of America (TIAA) supported this bill at a July before the Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets entitled, "Building a Sustainable and Competitive Economy: An Examination of Proposals to Improve Environmental, Social, and Governance Disclosures. In a letter to Chairwoman Waters, TIAA stated that "the proposed legislation would empower the Securities and Exchange Commission to determine the appropriate, material ESG factors for issuers to disclose in a uniform manner, allowing investors to better integrate ESG and sustainability factors into investment decisions and improve engagement with portfolio companies." Additionally, Tim Mohin, Chief Executive of the Global Reporting Initiative (GRI), testified before the Subcommittee that GRI "strongly supports this proposal as a way to strengthen the existing reporting requirement for publicly traded companies," and that the Sustainable Finance Advisory Committee established by the bill would "support the ongoing efforts...to facilitate the transition to sustainable global markets."

Amendment in the Nature of a Substitute to HR 4335, the "8-K Trading Gap Act of 2019" (Maloney)

Summary: This Amendment in the Nature of a Substitute would direct the SEC to issue a rule requiring public companies to put in place policies and procedures that are reasonably designed to prohibit officers and directors from trading company stock after the company has determined that a significant corporate event has occurred, and before the company has filed a Form 8-K disclosing such event. The bill allowed for limited exemptions.

Background: Public companies are required to disclose significant corporate events to investors and the public on Form 8-K within 4 business days after the event occurs.³² This means that company executives will know about material, nonpublic information for up to 4 days before it is disclosed to investors and the public. However, there is no SEC rule prohibiting these executives from buying (or selling) the company's securities during this 4-day gap between the occurrence of the material event and the filing of the Form 8-K. In fact, a 2015 study found that over a 6-year period, insiders who traded during this 4-day gap successfully earned \$105 million in above-market returns on these trades.³³ At an April hearing before the Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, Melanie Lubin, Maryland Commissioner of Securities and representative for the North American Securities Administrators Association (NASAA), noted that "there appears to be compelling evidence that this trading gap does exist and that it unfairly advantages corporate insiders by enabling them to enter into securities transactions before the public release of market moving information" and that "closing this gap is a basic issue of fairness for retail investors."³⁴ This bill is supported by the Council of Institutional Investors and the North American Securities Administrators Association.

³⁰ IOSCO, *Statement on Disclosure of ESG Matters by Issuers*, at 1 (January 18, 2019), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD619.pdf>.

³¹ See *id.* at 1, n. 1.

³² See Section 13(l) of the Exchange Act [15 U.S.C. § 78m(l)]; SEC, FORM 8-K, GENERAL INSTRUCTIONS, at 2, available at <https://www.sec.gov/about/forms/form8-k.pdf>.

³³ Robert J. Jackson, Joshua Mitts, and Alma Cohen, *The 8-K Trading Gap*, COLUM. LAW & ECON. WORKING PAPER NO. 524 (2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657877.

³⁴ Putting Investors First: Reviewing Proposals to Hold Executives Accountable, Hearing before the Subcomm. on Investor Protection, Entrepreneurship, and Capital Markets of the H. Comm on Financial Services, 116th Cong. (2019) (statement of Melanie Lubin, Maryland Commissioner of Securities and NASAA Board Member)

Amendment in the Nature of a Substitute to H.R. 4344, to amend the Securities and Exchange Act of 1934 to allow for the SEC to seek and Federal courts to grant restitution to investors and disgorgement of unjust enrichment (McAdams)

Summary: This Amendment in the Nature of a Substitute (ANS) clarifies that the SEC may obtain the following remedies that are not subject to a statute of limitations: (1) disgorgement in the amount of any unjust enrichment obtained by the defendant; and (2) injunctions, including officer and director bars.

Background: This ANS would overturn a recent Supreme Court case, *Kokesh v. SEC*, which held that disgorgement is a penalty and therefore subject to a five-year statute of limitations.³⁵ As a result of that case, the SEC may only bring cases for disgorgement within five years of the date of the violation, regardless of whether the SEC was able to detect it within five years of the violation. According to the SEC, the case has cost investors over \$800 million by limiting the time the SEC has to recover funds.³⁶

At a June hearing before the Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, former SEC prosecutor Jordan Thomas noted that this proposal would “undo the harm caused by *Kokesh*”.³⁷ The Securities Industry and Financial Markets Association agreed that equitable relief, and disgorgement in particular, should not be construed to be a penalty. This bill is supported by the North American Securities Administrators Association (NASAA) and Public Citizen.

³⁵ *Kokesh v. SEC*, 581 U.S. (2017).

³⁶ Dave Michaels, Supreme Court 2017 Decision Has Cost Investors Over \$800 Million, SEC Says, *The Wall Street Journal* (May 16, 2018), available at <https://www.wsj.com/articles/supreme-court-2017-decision-has-cost-investors-over-800-million-sec-says-1526487555>.

³⁷ 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).