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Partisan split emerges over question of providing agencies more reach-back on fines

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By **Mark Schoeff Jr.**

Bipartisan agreement on giving securities regulators more power to claw back money for harmed investors seems to be emerging on Capitol Hill, but Republicans and Democrats are split on strengthening regulators' ability to levy fines on financial firms.

Earlier this year, Sens. John Kennedy, R-La., and Mark Warner, D-Va., **introduced a bill** that would increase the statute of limitations for the Securities and Exchange Commission to seek so-called equitable remedies.

The measure addresses a **2017 Supreme Court decision, Kokesh v. SEC**, that limited the SEC to five years from the time a violation commenced to force the so-called disgorgement of ill-gotten gains. The bill keeps

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In an exchange with Mr. Kennedy at a May Senate Appropriations **subcommittee hearing**, Mr. Clayton said he supported the bill.

"A cut off of five years … rewards a well-concealed fraud," Mr. Clayton said. "I'd very much like us to have the power to get people their money back."

But the SEC has not voiced support for **a bill recently approved** by the House Financial Services Committee that would overturn another Supreme Court decision, **Gabelli v. SEC**, and would extend the statute of limitations for the SEC to impose fines from five to 10 years.

The measure drew opposition from all the Republicans on the committee, who said they would not support the longer reach-back on fines without related reforms to the SEC's internal adjudication process. The financial industry also opposes the bill.

Committee Republicans, however, said they would work with their Democratic colleagues on a companion measure to the bill introduced by Mr. Kennedy and Mr. Warner.

enforcement attorney who now runs his own securities law firm. "Disgorgement is giving back what you unlawfully gained. That's doable in many cases. But a fine could be crippling."

Depending on whether disgorged funds are returned to investors or are kept by the government, the action can either be defined as an equitable remedy or a penalty. In the Kokesh decision, the Supreme Court held that disgorgement is a penalty.

But restitution is an equitable remedy in the Kennedy-Warren bill — and the SEC and the Financial Industry Regulatory Authority Inc. have been focusing on it.

In concluding its mutual fund fee waiver initiative, Finra **emphasized returning money to investors** and gave firms credit for "extraordinary cooperation" if they speeded up the process.

"They're coming after us more and more for restitution," said Barry Temkin, a partner at Mound Cotton Wollan & Greengrass. "I'm noticing the trend."

In the SEC **initiative on high-expense share classes**, self-reporting firms avoided civil monetary penalties but still had to return money to investors.

"There's less of a public policy interest [in imposing fines] as opposed to getting money back from fraudsters," Mr. Chase said.

Nathan, a former senior enforcement official at the SEC, Finra and the Commodity Futures Exchange Commission.

"You never want to put the government before victims," said Mr. Nathan, who is now a partner at the law firm Orrick.

But financial firms that are in the crosshairs of regulators are leery of giving them too much latitude in reaching back to try to make an enforcement case.

"The industry doesn't want unlimited liability," Mr. Temkin said.

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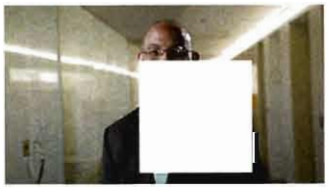

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