



March 1, 2016

RE: H.R. 3798, the Due Process Restoration Act of 2015

Dear Members:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I urge your support for H.R. 3798, the Due Process Restoration Act of 2015. It is currently scheduled for a markup tomorrow, March 2 at 10:00 am. This legislation would better ensure procedural fairness when the Securities and Exchange Commission (SEC) brings an administrative proceeding by giving respondents the option to timely terminate such proceeding, while still allowing the SEC the option to refile the action in federal district court.

NACDL's abiding mission is to ensure justice and due process for all. We encourage, at all levels of federal, state and local government, a rational and humane criminal justice policy. In keeping with this mission, we believe that people should have a right to not be potentially exposed to criminal punishment—and consequently deprived of their liberty or property—without adequate due process of law.

In recent years, the SEC has dramatically increased its reliance on administrative proceedings to adjudicate alleged violations of the securities laws, rather than file a civil action in federal district court. This shift in SEC protocol has dramatic implications, including preventing some respondents from being able to access federal district courts altogether and the more robust due process protections such access conveys. Unfortunately, the lack of sufficient procedural protections provided by administrative proceedings unjustly favors the SEC to the detriment of respondents, due to:

- inadequate notice periods (often after years-long investigations by the government);
- unrealistic deadlines for filing answers and motions for summary disposition;
- severe limitations on discovery—from the inadequate window for discovery, to the information that can be requested from the government, to the ability to depose witnesses (and in what matter); and
- lenient rules on the admissibility of hearsay and other unreliable evidence.

Furthermore, these administrative proceedings are not entirely independent. The same agency that brings the case also appoints the judges who ultimately preside over the matter. And any appeals will be heard before the Commissioners of the same agency that initially brought the case. SEC administrative proceedings also often parallel criminal investigations and prosecutions of the same respondents by the Department of Justice (DOJ). With the SEC and the DOJ collaborating and sharing information, the procedural inadequacies and the lack of impartiality combine to pose a substantial detriment to the fair and just operation of our criminal justice system.

Introduced by Representative Garrett, H.R. 3798 seeks to restore some elements of due process to SEC administrative proceedings. It would essentially grant SEC respondents the right to remove certain administrative proceedings to a federal district court. Specifically, the bill would amend the Securities and Exchange Act of 1934¹ to permit a private person (*i.e.*, an SEC respondent) to terminate an SEC administrative action brought pursuant to 5 U.S.C. § 554 within twenty days of the action being filed. Subsequently, the SEC would be given the opportunity to bring a civil action in federal district court. H.R. 3798 would also require the SEC to show by clear and convincing evidence that a private person has violated the relevant provision of law.

As we ask you to consider supporting this bill, we encourage Members to consider how this bill could be improved and how other reforms to the administrative proceedings process are also needed. For example, we support (and would ask the committee to consider):

- making the burden of proof the same in an administrative proceeding as it is in district court;
- imposing clearly defined limitations on when the SEC may use administrative proceedings to adjudicate matters over which the federal courts have jurisdiction;
- restricting the ability of the SEC to share information gathered during the course of an investigation with the DOJ and FBI without the consent, or even knowledge, of the respondents;
- adopting policies that would increase the fairness and minimize the burdens of the discovery process in SEC investigations, including: providing more reasonable timelines for document production, increasing the discovery rights of respondents, and imposing stricter rules on the admissibility of evidence; and
- adopting clear and consistent policies that would reform the SEC's "Wells" process (*i.e.*, the current notice and response procedures), including: providing respondents with a

¹ The legislation should also amend the 1933 Exchange Act, the Investment Company Act, and the Investment Advisors Act of 1940. As currently drafted, the bill only amends the 1934 Exchange Act and therefore only be applicable to a narrow band of cases. By expanding the applicability of this bill, it would ensure that the same right to a district court proceeding would be applicable for all respondents in major enforcement matters.

full presentation of the nature of a proposed case and the supporting evidence before commencing a Wells submission or white paper process, permitting access to investigative files with adequate time to permit a meaningful response to a Wells Notice or request for a white paper, and providing advance notice of intent to file an enforcement action.

NACDL urges you to support H.R. 3798 and other measures to increase procedural due process protections to those facing SEC administrative proceedings.

Respectfully,

A handwritten signature in black ink, appearing to read "E.G. Morris". The signature is fluid and cursive, with the first name "E.G." written in a more compact, stylized manner.

E.G. Morris
President, National Association of Criminal Defense Lawyers