

Securities Regulation Daily Wrap Up, JOBS ACT—House passes bipartisan capital formation package with crypto and banking provisions, (Jul. 18, 2018)

Securities Regulation Daily

By [Mark S. Nelson, J.D.](#)

The House passed a comprehensive capital formation package dominated by titles that would significantly revise securities regulations but which also contains numerous titles on banking, consumers, and combatting human and drug trafficking. The JOBS and Investor Confidence Act of 2018 ([S. 488](#)), also known as JOBS Act 3.0, is the product of a bipartisan compromise aimed at making it easier for smaller companies to raise capital. The legislative package, passed by a [vote](#) of 406-4, was added to a Senate-passed vehicle, so the [House version](#) will have to go back to the Senate for further action.

House Financial Services Committee Chairman Jeb Hensarling (R-Texas) [told](#) members the JOBS and Investor Confidence Act seeks to promote business activity that can help to sustain a 3 percent economic growth rate in the U.S. and to enable American companies to better compete with China regarding initial public offerings (IPOs). Chairman Hensarling noted that the legislation was needed because U.S. entrepreneurship had hit a generational low following a 20-year decline.

Ranking Member Maxine Waters (D-Calif) hailed the package as the result of "true bipartisanship" premised on Republicans' and Democrats' support for small businesses. Waters said the package will help small companies grow by encouraging capital formation, while also targeting other issues, including helping consumers with credit reporting, mortgage availability, and enhancing the government's response to human and drug trafficking.

Industry reaction was predictably favorable to the passage of the bill, which had been expected to arrive in some form ever since House members expressed the desire to move legislation in addition to the [Economic Growth, Regulatory Relief, and Consumer Protection Act](#), which became law in May. The [Investment Company Institute](#), the [Chamber of Commerce](#), and the Counsel of Institutional Investors all praised the House-led securities and banking package.

The CII, however, sounded a [warning](#) about the possibility of amendments being tacked on in the Senate. "With the bill now headed to the Senate, CII is hopeful that the legislation will remain bipartisan and free of amendments that would threaten fundamental shareholder protections. In that regard, CII strongly opposes any amendments to the bill that would create an intrusive new federal regulatory scheme for proxy advisors, which would inhibit the ability of shareowners to obtain timely, cost-effective, and independent research to assist in voting their shares responsibly."

The North American Securities Administrators Association also has previously voiced mixed views on some of the provisions included in the JOBS and Investor Confidence Act. While [supporting](#) the amended M&A broker provision (Title III) that more closely conforms to SEC no-action relief, NASAA has expressed concerns about the Senate version of the [demo days](#) provision in Title I (not properly tailored), worried about lowered investor protections and preemption of state laws regarding [venture exchanges](#) (Title XX) (the legislation, as passed, provides that a security is not a covered security if it is only listed, or authorized for listing, on a venture exchange), and critiqued revisions to the definition of [accredited investor](#) (Title IV) that do not truly modernize existing requirements and that would apply inflation adjustments only prospectively.

As for what may be next in corporate legislation this year, Chairman Hensarling indicated that the House and Senate were still working out differences between their separate reform packages for the Committee on Foreign

Investment in the United States (CFIUS). A free-standing version of the Foreign Investment Risk Review Modernization Act of 2017 ([H.R. 5841](#)) passed the House by a vote of 400-2, while the Senate version (S.2098) was included as Title XVII of the Senate's version of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 ([S. 2987](#)) and then added by the Senate as an amendment to the House-passed version of the NDAA, which the Senate then also passed by a vote of 85-10 ([H.R. 5515](#)). The [report](#) accompanying the House's freestanding bill notes that sensitive, non-controlling investments by foreign firms in the U.S. would get closer scrutiny under the legislation. The Administration [backs](#) CFIUS reforms, but has objected to provisions in at least one bill that would upset an Administration decision regarding a single company. Still, it seems likely that if corporate-themed legislation moves this year it may involve changes to the CFIUS process for reviewing certain mergers and acquisitions.

Capital formation, crowdfunding and IPOs. The JOBS and Investor Confidence Act contains numerous capital formation provisions. For one, Title I of the bill, the Helping Angels Lead Our Startups (HALOS) Act, would make it easier for small companies to promote their IPOs. The Jumpstart Our Business Startups (JOBS) Act lifted the ban on general solicitation in some offerings, but the HALOS Act directs the SEC to amend current rules to clarify the legal status of events commonly attended by issuers seeking to raise capital. Specifically, the Commission would have to provide that "demo days" events sponsored by, among others, angel investor groups, enjoy an exception from the ban on general solicitation.

Other provisions in the JOBS and Investor Confidence Act would expand the ability to test-the-waters in advance of an offering (Title IX) and revise the crowdfunding provisions to allow for crowdfunding vehicles and to provide for tailored registration requirements for crowdfunding vehicle advisers (Title XXXII). Another provision (Title V) would create an exemption from Sarbanes-Oxley Act Section 404(b) for low revenue issuers.

Broker-dealers. Title III of JOBS and Investor Confidence Act would graft a new exemption onto Exchange Act Section 15(b) to provide an exemption for M&A brokers from these registration requirements, provided certain criteria are met. Exchange Act Section 15(a) makes it unlawful to act as a broker or dealer without being registered with the Commission. Under the Exchange Act, "broker" means someone who is in the business of effecting securities transactions for others; "dealer" means someone whose business is the buying and selling of securities for their own account through a broker or otherwise.

Insiders and 10b5-1 plans. The House package (Title XXVII) also includes the Promoting Transparent Standards for Corporate Insiders Act (H.R. 6320), sponsored by Ranking Member Waters, which would require the SEC to study the current state of Rule 10b5-1 trading plans and assess whether to limit trading during issuer-adopted trading windows, to curb the use of multiple or overlapping trading plans, to mandate a delay between adoption of a trading plan and the first executed trade under the plan, to restrict an insider's ability to modify or cancel a trading plan, to require companies and insiders to make certain filings with the Commission, and to mandate that company boards adopt relevant policies and monitor for compliance. The study also must consider factors such as whether revisions to Exchange Act Rule 10b5-1 would alter companies' desire to be public, impact capital formation, or affect the ability to recruit executives.

Exchanges. Under Title XX of the JOBS and Investor Confidence Act, the Commission could register venture exchanges that trade venture securities. These securities would trade only on venture exchanges and would be subject to a public float threshold, although venture securities that exceed the threshold would not immediately cease to be venture securities.

Title VIII of the JOBS and Investor Confidence Act would require the Commission to clarify the meaning of "facility" as the term is used in Section 3(a)(1) of the Exchange Act. The Commission has previously provided additional clarity about other terms of art used in this part of the Exchange Act (See Exchange Act Rule 3b-16).

Accredited investors. Title X of the JOBS and Investor Confidence Act would treat a family office or a family client of a family office as accredited investors if certain requirements are met. Title IV of the bill would likewise expand the definition of accredited investor to certain licensed individuals and to individuals with demonstrable education or job experience if these persons have professional knowledge of the subject matter of a particular investment.

Virtual currencies and trafficking. The JOBS and Investor Confidence Act would continue a recent Congressional trend of targeting crimes of sexual violence and human trafficking through regulation, although the relevant provisions, unlike a similar securities law provision for conflict minerals, would be housed in non-securities statutes (previously, lawmakers had introduced legislation to require companies to make securities disclosures about human trafficking in their supply chains). Title VI of the bill would mandate additional coordination and monitoring by federal regulators regarding human trafficking under the Victims of Trafficking and Violence Protection Act of 2000. Title XXIII of the bill would require a GAO study of the role played by virtual currencies in enabling sex and drug trafficking. The preamble to the provision notes that virtual currencies are a "prominent" payment method with respect to illegal sex and drug trafficking.

Moreover, Title XVI of the JOBS and Investor Confidence Act would direct the president and federal law enforcement agencies to develop a national strategy to combat the financial networks of transnational organized criminals.

Banking provisions. The JOBS and Investor Confidence Act contains banking provisions that span multiple titles and generally function as a further easing of banking regulations in addition to the recent relaxation of Dodd-Frank Act mandates enacted via the Economic Growth, Regulatory Relief, and Consumer Protection Act. Title XV of the JOBS and Investor Confidence Act, for example, would allow the SEC and the CFTC to adopt regulations for financial companies for which they are the primary financial regulatory agency requiring these companies to conduct periodic analyses of their financial condition, including analyses of liquidity under adverse economic conditions. Title XII of the bill would provide for updates to living wills every two years instead of periodically. Title XIX of the bill would grant banks a safe harbor when they keep open certain accounts at the request of law enforcement.

Under Title II of the bill, the Fair Credit Reporting Act would be amended to allow for increased reporting of consumers' positive credit histories which, according to the authors of the underlying legislation, could allow consumers to obtain more stable and affordable credit. Title XXI would clarify the disclosure requirements for residential mortgages made for charitable purposes.

LegislativeActivity: Blockchain BrokerDealers CorporateFinance CorporateGovernance CorpGovNews GCNNews DirectorsOfficers DoddFrankAct Enforcement ExchangesMarketRegulation FederalPreemption FedTracker Securities FiduciaryDuties FinancialIntermediaries FormsFilings FraudManipulation InvestmentAdvisers InvestmentCompanies IPOs JOBSAct MergersAcquisitions SarbanesOxleyAct SecuritiesOfferings