

[Securities Regulation Daily Wrap Up, TOP STORY—House sends ETF research safe harbor bill to president, \(Sept. 27, 2017\)](#)

Securities Regulation Daily Wrap Up

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The House passed the Fair Access to Investment Research (FAIR) Act of 2017 thus clearing the way for a presidential signature on legislation that would create a safe harbor for investment fund research reports regarding exchange traded funds (ETFs). The FAIR Act, [S. 327](#), sponsored by Sen. Dean Heller (R-Nev), previously passed the Senate by unanimous consent and cleared the House today by voice vote. The Commission would be required to propose an implementing rule within 180 days after enactment and adopt a final rule within 270 days after enactment, although broker-dealers could rely on the legislatively-required change during an interim period if the Commission takes longer to adopt a final rule.

ETFs like other asset classes. Backers of the legislation noted the disparate treatment for research on ETFs versus other asset classes, which currently enjoy safe harbors under federal securities regulations for similar investment research. Representative French Hill (R-Ark), sponsor of the mirror image House bill, praised the Senate's passage of its version of the bill, which he said contained significant clarifications. The House bill's co-sponsor, Rep. Bill Foster (D-Ill) noted that an amendment proposed by Sen. Elizabeth Warren (D-Mass) on limits for affiliates had been included in the Senate version.

Provisions creating an ETF research report safe harbor had been inserted into the Financial CHOICE Act ([H.R. 10](#), Section 421), the House-passed mini bus appropriations bill ([H.R. 3354](#), Section 910), the precursor House financial regulators' appropriations bill ([H.R. 3280](#), Section 911), and also had appeared in the House's stand-alone bill ([H.R. 910](#), and House [Rep. 115-102](#)) that had been [re-introduced](#) by Rep. Hill and passed the house in May by a [vote](#) of 405-2.

Safe harbor. The FAIR Act requires the Commission to revise Securities Act Rule 139 to provide that a covered investment fund research report published or distributed by a broker-dealer, who is not an investment adviser to the fund or investment adviser-affiliated person, is not an offer for sale or an offer to sell a security pursuant to an effective registration statement, even if the broker-dealer will participate in the registered offering of the covered investment fund's securities.

But there are several things the Commission's revised rule cannot do. For one, the Commission must not condition the safe harbor on a broker-dealer's initiation or re-initiation of research coverage where the covered investment fund's securities are in substantially continuous distribution. Likewise, the Commission must not require a covered investment fund to register under the Investment Company Act or be an Exchange Act reporting company for a longer time period than is specified in Rule 139. Nor can the Commission impose a minimum float requirement more stringent than the one specified in Rule 139 and Forms S-3 and F-3.

The Commission, however, must provide that a self-regulatory organization cannot bar a member from publishing or distributing a covered investment fund research report or from participating in such a registered offering solely because the member is or has engaged in activities allowed for research reports. Similarly, the Commission must provide in its rule that a covered investment fund research report is not subject to Section 24(b) of the Investment Company Act. But these reports would still be subject to the Investment Company Act and any related rules to the extent that the reports are not subject to an SRO's content standards for research reports.

The legislation, however, withholds the safe harbor from broker-dealers' publication or distribution of covered investment fund research reports dealing with business development companies or registered closed-end

investment companies. Although even the exception has an exception for activities expressly permitted by the federal securities laws or regulations.

Moreover, the bill defines "research report" as "a written, electronic, or oral communication that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision." But the definition omits "oral communication" and refers to Securities Act Section 2(a)(3), which differs slightly in emphasis from the Rule 405-based definition of the term in Rule 139.

Interim period, antifraud provisions. Otherwise, the federal securities laws' antifraud provisions would remain in force regarding covered investment fund research reports as would SROs' authority to examine or supervise their members. The bill also provides for interim effectiveness of the safe harbor in the event the Commission has not revised Rule 139 in the prescribed time frame. During the interim period, and until the Financial Industry Regulatory Authority updates its Rule 2210, a covered investment fund is a security deemed listed on a national securities exchange and not subject to Investment Company Act Section 24(b).

Communications regarding covered investment funds within Investment Company Act Section 24(b) need not be filed with FINRA. But FINRA may still mandate such filings where the purpose of the communication is something other than to provide research and analysis of covered investment funds.

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