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When you have to be right

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Highlights

- Capital formation provisions would include new disclosure obligations for companies with multi-class share structures
- Legislation would allow M&A broker exemption from Exchange Act registration requirements
- SEC would be required to study the need for revisions to Exchange Act Rule 10b5-1
- Venture exchanges would be allowed to trade venture securities
- Definition of "accredited investor" would be expanded
- Banks would get additional relief regarding living wills
- The FCRA would be amended to allow reporting of positive credit history
- Disclosure obligations would be eased for mortgages offered by charitable organizations

Inside

By Mark S. Nelson, J.D. and John M. Pachkowski, J.D.

JOBS Act 3.0: capital formation, banking, crypto, and trafficking concerns rise to fore; Senate still to act

Executive Summary

For the second time in a year, Congress has moved forward on legislation that would significantly revise securities and banking laws and regulations. The House-passed 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 bulk of the bill's titles would address a variety of capital formation issues facing smaller companies under existing securities regulations, but the bill also would provide targeted relief to banks and consumers, and it would combat illegal human, sex, and drug trafficking. The legislative package comes just months after Congress enacted the Economic Growth, Regulatory Relief, and Consumer Protection Act. The JOBS and Investor Confidence Act passed the House by a vote of 406-4, but because the bill was added to a Senate-passed vehicle, the House version will have to go back to the Senate for further action.

Introduction

It had been widely expected that the House would proceed with a significant legislative package of securities and other financial reforms after the Senate rejected House efforts to include more House bills in the Economic Growth, Regulatory Relief, and Consumer Protection Act. The JOBS and Investor Confidence Act's titles emphasize capital formation, although the bill contains numerous provisions that would impact banking and other financial regulations.

Most of the bills included in the House package were reported out of the House Financial Services Committee or passed the full House by wide margins with only a few exceptions. A provision to ease audit requirements for small issuers, for example, drew significant dissent from members of the House FSC and was not otherwise voted on by the full House until it was made part of the JOBS and Investor Confidence Act. Likewise, a credit union risk-based capital provision and a provision on crowdfunding vehicles were introduced but received no further attention except as components of the JOBS and Investor Confidence Act.

The securities provisions contained in the JOBS and Investor Confidence Act fall within several broad categories: (1) capital formation and IPOs, (2) broker-dealers, (3) corporate insiders and Rule 10b5-1 plans, (4) exchanges, and (5) investment companies and advisers. The following graphic summarizes proposed changes to securities laws:

Securities Provisions in the JOBS and Investor Confidence Act

Capital Formation and IPOs

Title	Bill No.	Topic	Description
I	*H.R. 79*	Helping Angels Lead Our Startups (HALOS) Act	Clarifies solicitations made at demo days.
IV	*H.R. 1585*	Fair Investment Opportunities for Professional Experts Act	Extends accredited investor status to professionals.
V	*H.R. 1645*	Fostering Innovation Act	Creates Sarbanes-Oxley Act exemption for low revenue issuers.
IX	*H.R. 3903*	Encouraging Public Offerings Act	Expands availability of confidential SEC staff registration reviews and expands availability of test-the-waters provisions.
XI	*H.R. 4281*	Expanding Access to Capital for Rural Job Creators Act	Directs SEC Advocate for Small Business to consider issues unique to rural firms.
XXII	*H.R. 5970*	Modernizing Disclosures for Investors Act	Streamlines reporting on SEC Form 10-Q.
XXIX	*H.R. 6322*	Enhancing Multi-Class Share Disclosures Act	Requires companies to make disclosures about non-traditional share class structures.
XXX	*H.R. 6323*	National Senior Investor Initiative Act	Creates a task force within the SEC for issues regarding senior investors.
XXXI	*H.R. 6324*	Middle Market IPO Underwriting Cost Act	Mandates study of IPO underwriting costs.
Broker-Dealers			
III	*H.R. 477*	Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act	Creates registration exemption from broker-dealer regulations for M&A brokers.
Corporate Insiders and Rule 10b5-1 Plans			
XXVII	*H.R. 6320*	Promoting Transparent Standards for Corporate Insiders Act	Mandates study of insider trading and Exchange Act Rule 10b5-1 plans.
Exchanges			
VIII	*H.R. 3555*	Exchange Regulatory Improvement Act	Requires Commission to clarify definition of "facility" as used in Exchange Act.
XX	*H.R. 5877*	Main Street Growth Act	Provides for the registration of venture exchanges.
Investment Companies and Advisers			
X	*H.R. 3972*	Family Office Technical Correction Act	Clarifies application of "accredited investor" definition to family offices.
XXIV	*H.R. 6139*	Improving Investment Research for Small and Emerging Issuers Act	Mandates study to better understand why analysts rarely follow small companies.
XXV	*H.R. 6177*	Developing and Empowering Our Aspiring Leaders (DEAL) Act	Directs Commission to revise Advisers Act Rule 203(l)-1 to include equity security in "qualifying investment" and to clarify private fund eligibility as "venture capital fund."
XXVI	*H.R. 6319*	Expanding Investment in Small Businesses Act	Mandates study of Investment Company Act 10 percent diversification threshold.
XXVIII	*H.R. 6321*	Investment Adviser Regulatory Flexibility Improvement Act	Directs Commission to revise definitions of "small business" and "small organization" in Advisers Act Rule 0-7.
XXXII	*H.R. 6380*	Crowdfunding Amendments Act	Clarifies legal status of crowdfunding vehicles and crowdfunding vehicle advisers.

Meanwhile, the banking provisions in the JOBS and Investor Confidence Act divide into three main categories: (1) bank capital and related matters; (2) credit reporting, mortgages and insurance, and (3) transnational crime and trafficking. The following graphic summarizes the various proposed changes to banking laws:

Banking Provisions in the JOBS and Investor Confidence Act

Bank Capital and Related Matters

Title	Bill No.	Topic	Description
VII	*H.R. 2364*	Investing in Main Street Act	Amends the Small Business Investment Act to allow banks, with banking regulator approval, to invest up to 15 percent of capital and surplus in an SBIC.
XII	*H.R. 4292*	Financial Institution Living Will Improvement Act	Amends Dodd-Frank Act Section 165 to, among other things, require living will updates every two years.
XIII	*H.R. 4294*	Prevention of Private Information Dissemination Act	Establishes criminal liability for regulators who make unauthorized disclosures of living wills/stress test data.
XV	*H.R. 4566*	Alleviating Stress Test Burdens to Help Investors Act	Preserves SEC/CFTC authority to require non-bank financial institutions to conduct periodic analyses of financial condition.
XVII	*H.R. 5288*	Common Sense Credit Union Capital Relief Act	Delays effectiveness of the NCUA's risk-based capital rule until January 1, 2021.
XVIII	*H.R. 5749*	Options Market Stability Act	Directs banking regulators to adopt a method for calculating counterparty credit risk exposure regarding guarantees made by depository institutions or their holding companies.
XIX	*H.R. 5783*	Cooperate with Law Enforcement Agencies and Watch Act	Creates financial institution safe harbor for keeping accounts open upon law enforcement request.

Credit Reporting, Mortgages and Insurance

II	*H.R. 435*	Credit Access and Inclusion Act	Amends Fair Credit Reporting Act to allow reporting of positive credit history.
XIV	*H.R. 4537*	International Insurance Standards Act	Provides that U.S. standard setters must ensure international standards agreements recognize the U.S. insurance regulatory system.
XXI	*H.R. 5953*	Building Up Independent Lives and Dreams (BUILD) Act	Eases disclosure requirements under TILA and RESPA for mortgages offered primarily for charitable purposes.

Transnational Crime and Trafficking

VI	*H.R. 2219*	End Banking for Human Traffickers Act	Directs Treasury and banking regulators to enhance current approach and recommend new enforcement measures to combat money laundering that aids human trafficking.
XVI	*H.R. 4768*	National Strategy for Combatting the Financing of Transnational Criminal Organizations Act	Directs federal regulators to develop a strategy to combat transnational crime.
XXIII	*H.R. 6069*	Fight Illicit Networks and Detect (FIND) Trafficking Act	Directs the GAO to report to Congress on how virtual currencies and online marketplaces facilitate sex and drug trafficking.

The following sections in this paper examine the securities and banking topics listed above in greater detail. A concluding section takes stock of how securities and banking legislation has evolved in 2018, with emphasis on the prospects for the JOBS and Investor Confidence Act to be enacted this year, plus a look ahead at additional corporate- and financial-themed bills that also could be enacted later this year.

Capital formation and IPOs

The capital formation provisions contained in the JOBS and Investor Confidence Act would address a range of issues currently perceived by lawmakers to hinder IPOs. For example, smaller companies would gain clarity on demo days events and be excluded from certain SOX disclosure requirements, and all companies would be able to submit registration statements for confidential staff review and to engage in test-the-waters activities. Moreover, companies that adopt novel share class structures would be subjected to increased disclosure obligations.

The definition of accredited investor also would apply to a person with demonstrable education or job experience such that they have professional knowledge of a subject related to a particular investment, if the person's education or job experience is verified by FINRA or another self-regulatory organization (SRO).

Demo days events. Title I of the JOBS and Investor Confidence Act sets the capital formation tone of the legislation by clarifying that the ban on general advertising and general solicitation is inapplicable to demo days events where issuers make presentations to, among others, angel investor groups. "Angel investor group" would be defined as a group of accredited investors who invest personal capital in early-stage companies, who hold regular meetings and observe defined processes and procedures for making investment decisions, and who are not associated with broker-dealers or investment advisers.

Demo days sponsors, however, would not be able to refer to specific securities offerings, could not make investment recommendations or provide investment advice, and could distribute only limited information about issuers planning to offer securities. The Commission would be directed to implement the required revisions via Regulation D, but only for presentations and communications, not purchases or sales. Investors in exempt offerings under Rule 506(b) of Regulation D often must come to an offering through a prior substantive relationship with the issuer, but Title I would explicitly provide that attendance at a demo days event does not, in isolation, establish a pre-existing, substantive relationship with an issuer. Moreover, an issuer at a demo days event must not be: (1) bankrupt or in receivership; (2) an investment company, or (3) a blank check, blind pool or shell company.

Accredited investors. Title IV of the JOBS and Investor Confidence Act would codify the definition of "accredited investor" contained in Rule 501 of Regulation D but with a significant expansion. As a result, the statutory definition would extend accredited investor status to persons who are licensed or registered brokers or investment advisers. The definition of accredited investor also would apply to a person with demonstrable education or job experience such that they have professional knowledge of a subject related to a particular investment, if the person's education or job experience is verified by FINRA or another self-regulatory organization (SRO). The statutory definition would further incorporate the existing regulatory definition which applies to a natural person whose net worth exceeds $1 million and to a natural person with individual income over $200,000 or joint income with their spouse over $300,000 during the two most recent years and who has a reasonable expectation of maintaining that income in the current year. The net worth and income levels would be adjusted for inflation

every five years, a requirement absent from the current definition contained in Rule 501.

The accredited investor definition has sometimes resulted in controversy for the SEC's relevant advisory committee. In October 2014, for example, the SEC's Investor Advisory Committee approved a recommendation by a vote of 15-1 to extend accredited investor status to persons based on their financial sophistication, while further recommending that the Commission reconsider whether existing net worth and other financial requirements accurately define those persons who can, in the words of the Supreme Court's *Ralston Purina* opinion, fend for themselves without the protections of the Securities Act. Then-committee member Hester Peirce (currently an SEC commissioner) dissented in a statement and in an op-ed piece published in *The Hill* because she believed the recommendation could push the Commission to increase existing financial thresholds; Peirce, however, welcomed the recommendation to expand the definition to qualified professionals. A 2013 GAO study observed that net worth remained the primary criteria for determining accredited investor status, but the study also suggested alternative criteria, including the use of an investment adviser.

SOX low-revenue-issuer exemption. The Jumpstart Our Business Startups (JOBS) Act created a new category of small company called an emerging growth company that enjoys certain exemptions to existing securities laws in order to promote capital formation, including an exemption from the Sarbanes-Oxley Act's auditor attestation and report requirement regarding the internal control assessment mandated by SOX. Title V of the JOBS and Investor Confidence Act would extend the SOX exemption beyond the five-year limit under current law for EGCs that are low-revenue issuers, which would include companies with less than $50 million average annual gross revenues and that are not large accelerated filers (i.e., among other things, $700 million in public float per Exchange Act Rule 12b-2). This temporary exemption would expire on the earlier of: (1) the end of the fiscal year following the tenth anniversary of the EGC's first sale of common equity securities under an effective registration statement; (2) the end of the fiscal year in which the issuer's average annual gross revenues exceeded $50 million; or (3) the date the issuer becomes a large accelerated filer.

Confidential review of registrations and testing-the-waters. The JOBS Act accorded EGCs special treatment to promote capital formation by, among other things, allowing EGCs to submit draft registration statements to the SEC staff for confidential review prior to publishing them (along with any amendments) on EDGAR 15 days before a road show. Title IX of the JOBS and Investor Confidence Act would codify this option for all issuers. The legislation also would permit issuers to use this option for a second offering within one year of an IPO or of the registration of securities under Exchange Act Section 12(b). However, the Commission may adopt regulations imposing additional requirements for issuers that are not EGCs, if it first reports to Congress on the need for such regulations. The SEC's Division of Corporation Finance has previously announced (FAQ) that it would informally extend this benefit to all public issuers.

Another provision in Title IX would extend the test-the-waters provisions for EGCs to all issuers. As with confidential staff review of registration statements, the Commission may adopt regulations adding requirements for non-EGCs if it first tells Congress why the regulations are needed.

Rural job creators. Title XI of the JOBS and Investor Confidence Act would amend Exchange Act Section 4(j) to direct the SEC's Advocate for Small Business Capital Formation to consider issues unique to rural-area small businesses. If enacted, the legislation would be the second change to this part of the Exchange Act within the last year. Title IX of Division S of the Consolidated Appropriations Act, 2018 directed the Advocate for Small Business to consider the needs of small businesses following natural disasters.

Form 10-Q reforms. The SEC has for several years considered various possible reforms regarding disclosure effectiveness. Title XXII of the JOBS and Investor Confidence Act would require the Commission to analyze the costs and benefits of quarterly disclosures made on Form 10-Q. Specifically, the Commission would have to report to Congress on the costs and benefits of such disclosures to EGCs, to the Commission, to other reporting companies, and to investors and market researchers. The analysis also would have to examine alternative forms of disclosure (e.g.,

a quarterly earnings press release), including the impact of alternative forms of disclosure on EGCs and on overall market transparency and efficiency.

Multi-class share structures. Under Title XXIX of the JOBS and Investor Confidence Act, Exchange Act Section 14 would be amended to direct the Commission to issue regulations requiring issuers with multi-class share structures to make additional disclosures to investors in proxy or consent solicitations for annual shareholders meetings or in other filings as deemed appropriate by the Commission. The provision would define "multi-class share structure" to mean a capitalization structure with at least two classes of securities with different amounts of voting rights in director elections.

The Enhancing Multi-Class Stock Disclosures Act (H.R. 6322), sponsored by Rep. Gregory Meeks (D-NY), the underlying legislation, is an acknowledgement that several recent, high profile IPOs have occurred where the shares sold to public investors either lacked voting rights or had other significant restrictions versus the shares to be held by the owners and executives of the companies.

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Snap, Inc., which went public in March 2017, is often cited as an example of the potential problems with IPOs premised on multi-class share structures. Snap is a social media company whose platform leverages smartphone cameras to produce photos or "snaps" that are then posted online for users for no longer than 24 hours as a mode of storytelling. According to Snap's February 2, 2017, Form S-1, the company expected to have three share classes: Class A with no voting rights; Class B with one vote per share; and Class C with 10 votes per share. Classes B and C were expected to vote as a single class, including in elections of directors. An amended Form S-1 noted that two co-founders would have 88.5 percent of the voting power of the company's outstanding stock following Snap's IPO. Snap also noted that it could not predict how its share structure might impact trading of Class A shares without voting rights versus a scenario in which Class A shares have such rights. Snap, however, stated that Class A shareholders would be invited to attend annual shareholder meetings and they could submit questions to management.

During the run-up to its IPO, the SEC staff had queried Snap on a range of topics related to its share structure. Staff comments included requests that Snap: (1) state if shareholders file reports under Exchange Act Sections 13(d), 13(g), and 16; (2) provide a plain English explanation of the differing information shareholders will receive, or disclose certain risks and the impact to Class A shareholders regarding the timing of Form 8-K disclosures versus disclosures under Regulations 14A and 14C; and (3) explain the impact on Class A shareholders of a vote by class B and C shareholders to increase authorized shares under Delaware General Corporation Law Section 242(b)(2) (See, SEC letter 11/29/16; Snap

letter 12/7/16; SEC letter 12/23/16; Snap letter 1/3/17; SEC letter 1/18/17; Snap letter 1/26/17; SEC letter 2/2/17; Snap letter 2/8/17; SEC letter 2/14/17; Snap letter 2/16/17).

SEC Commissioner Robert Jackson also highlighted the issue of multi-class share structures in his first major speech as a commissioner. For Jackson, though, the question is one of how long a company should retain a multi-class structure post-IPO rather than a debate about the merits and demerits of such structures. According to Jackson's own empirical research, there is some connection between multi-class share structures and poorer corporate performance. Jackson found this decline occurred for companies with multi-class share structures versus those without them, and between companies with multi-class share structures without sunset provisions and those with sunset provisions. Jackson cautioned, however, that the results of his analysis did not necessarily mean that there is a causal relationship between lower valuations and multi-class share structures.

Senior Investor Taskforce. Under Title XXX of the JOBS and Investor Confidence Act, the Commission would be directed to establish the Senior Investor Task Force. The task force would be appointed by the chairman (in consultation with the other commissioners) and would include staff selected from the SEC's Division of Enforcement, the Office of Compliance Inspections and Examinations, and the Office of Investor Education and Advocacy. The task force's purpose would be to better understand how cognitive decline relates to financial exploitation and, in consultation with other regulators and with self-regulatory organizations, to report its findings and recommendations to Congress every two years, beginning after the GAO first reports to Congress and the task force one year after enactment regarding the economic costs of the financial exploitation of seniors. "Senior investor" would be defined as an investor over the age of 65. The task force, however, would sunset ten years after enactment unless the SEC's chairman has reestablished the task force.

IPO costs. Lawmakers have addressed the perceived decline in the number of U.S. IPOs several times in recent years, including in the JOBS Act. Presently, many companies that might otherwise go public have opted to remain private, or to remain private longer, for a variety of reasons, including the prospect of selling a business to an established company and an abundance of private capital. Title XXXI of the JOBS and Investor Confidence Act would direct the SEC and FINRA to study the costs of IPOs for small- and medium-sized companies and the impact of these costs on the availability of mid-market companies' securities in which retail investors might invest. The report mandated by the title would be due to Congress within one year after enactment.

Broker-dealers

Title III of the JOBS and Investor Confidence Act contains the Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2017. The underlying legislation, sponsored by Rep. Bill Huizenga (R-Mich), seeks to create an exemption from registration as a broker-dealer for persons who handle mergers and acquisitions of small, privately held companies. The M&A broker bill, however, has had a long and sometimes contentious history, although the version included in Title III contains investor protections that track existing SEC guidance. Title III would become effective 90 days after enactment.

Adding the guardrails. The M&A broker bill advanced slowly in the House over the course of three Congresses. As House FSC Ranking Member Maxine Waters (D-Calif) has noted, the purpose of the legislation in the 113th Congress was to push the SEC to finish its no-action relief. According to the original backers of the current bill, it is nothing more than a codification of no-action relief issued by the SEC in 2014. That relief was prompted by a letter to the SEC noting the disparate treatment under the Exchange Act and two Supreme Court opinions of similar M&A transactions: a transaction involving securities would require registration as a broker-dealer; by contrast, an asset sale would not require registration.

But the minority view, as expressed most recently in House Report No. 115–431, noted the absence from the current bill text of investor protections regarding conflicts of interest, deal financing, and the ability of brokers to bind parties to an M&A transaction. The House FSC reported the bill two months ago by a vote of 37-23. Although the bill that passed the House FSC deviated from the terms of the SEC's no-action

letter, it did more closely track language contained in a model rule adopted by the North American Securities Administrators Association; NASAA had urged the House FSC to favorably report the bill.

"M&A broker" would mean a broker, or person associated with a broker, who is engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of an eligible privately held company regardless of whether the broker acts on behalf of a buyer or seller.

But when the full House mulled the M&A broker bill in late 2017, House FSC Chairman Jeb Hensarling (R-Texas) told members that he and Ranking Member Waters had agreed on a path forward regarding M&A brokers that depended on an amendment to be offered by Rep. Brad Sherman (D-Calif), which would add investor protections to the bill such that it would more closely track the SEC's no-action letter. The bill's sponsor, Rep. Huizenga, backed the Sherman amendment, which was approved by the full House by voice vote.

As amended, the M&A broker bill now includes the investor protections required by the SEC's no-action letter, adds the definition of "business combination related shell company," clarifies which officers exercise control and raises the control thresholds from 20 percent to 25 percent, and gives the Commission authority to make inflation adjustments to EBITDA and gross revenues thresholds. The amended bill now goes beyond NASAA's model rule (See, comparison chart).

The exemption. Title III would amend Exchange Act Section 15(b) to add a new subsection that exempts M&A brokers from the broker-dealer registration requirements. "M&A broker" would mean a broker, or person associated with a broker, who is engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of an eligible privately held company regardless of whether the broker acts on behalf of a buyer or seller.

A broker could claim the exemption if he or she reasonably believes the following two things: (1) when the transaction is consummated, persons who acquire securities of an eligible privately held company will control and actively manage the eligible privately held company; and (2) persons who are offered securities in exchange for securities or assets of an eligible privately held company will get or have reasonable access to the most recent year-end financial statements of the issuer of the securities. With respect to the second item, if the financials are audited, the offeree must receive a balance sheet dated within 120 days before the offer plus information about the issuer's management, business, results of operations, and material loss contingencies.

An "eligible privately held company" would be a company that: (1) has no securities registered or required to be registered under Exchange Act Section 12 or for which it is required to make periodic filings with the SEC; and (2) for the fiscal year before the fiscal year in which an M&A broker is engaged for a transaction, had (i) EBITDA under $25 million and/or (ii) gross revenue under $250 million. The Commission could alter the statutory amounts, and these amounts would be adjusted for inflation every five years (as drafted, Title III's inflation provision refers to the definition of "control," which contains percentages and not dollar amounts; the drafters likely intended for the inflation adjustment to apply to the definition of "eligible privately held company," which contains dollar amounts).

When the exemption is unavailable. The exemption for M&A brokers would be unavailable in some instances, although a few of the transactions that would be off limits are allowed if the M&A broker makes certain disclosures. As a result, an M&A broker could not claim the exemption if he or she:

- Holds, transmits, or has custody of securities to be exchanged.
- Engages on an issuer's behalf in a public offering of securities required to be registered under Exchange Act Section 12.
- Engages on a party's behalf regarding transactions involving a shell company (other than a

business combination shell company).

- Provides financing regarding the transfer of ownership of an eligible privately held company.
- Assists a party to obtain financing from an unaffiliated third party unless the M&A broker complies with applicable laws and makes written disclosures about compensation.
- Represents the buyer and seller in the same transaction without providing "clear written disclosure" about the dual representation and obtaining both parties' written consent.
- Facilitates a transaction with a buyers group formed with the M&A broker's assistance to acquire an eligible privately held company.
- Engages in a transaction where an eligible privately held company will be transferred to passive buyers. Note that one of the requirements for claiming the exemption is that the broker must reasonably believe the person who acquires an eligible privately held company will control and actively manage the company. However, a buyer who will actively manage the company would not be a passive buyer, even if the buyer is owned by passive beneficial owners.
- Binds a party to a transfer of ownership in an eligible privately held company.

Disqualification. Title III also would withhold the exemption from broker-dealer registration if an M&A broker is subject to certain types of disciplinary actions. Specifically, the exemption is unavailable if an M&A broker has been subjected to: (1) a Commission order of suspension, revocation or other limits under Exchange Act Section 15(b)(4); (2) a statutory disqualification regarding membership in an SRO under Exchange Act Section 3(a)(39); (3) a disqualification under the bad actor provisions of Regulation D Rule 506(d), as revised by the Dodd-Frank Act; or (4) a final order issued by state securities and banking regulators or an order issued by federal banking regulators.

Corporate insiders and Rule 10b5-1 plans

Title XXVII of the JOBS and Investor Confidence Act 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 Exchange Act Rule 10b5-1 trading plans. Rule 10b5-1, adopted by the Commission in 2000, has served as a defense to insider trading liability for executives who carefully follow its requirements. One of the motivations for the study was the revelation in news reports that Intel CEO Brian Krzanich had exercised company stock options and sold the resulting shares pursuant to a modified Rule 10b5-1 trading plan in a time frame when Intel allegedly became aware of the Meltdown and Spectre cybersecurity vulnerabilities affecting Intel processors.

SEC study of Rule 10b5-1. The bill underlying Title XXVII of the JOBS and Investor Confidence Act received bipartisan support when it was marked up by the House FSC. Ranking Member Waters said the study is needed because of "shortcomings" in existing Rule 10b5-1, including that trading plans need not be filed with the SEC, executives can change or cancel trading plans any time, and executives can still trade outside of their trading plans. The measure was welcomed by Chairman Hensarling, who characterized insider trading as a "very, very serious issue," and said that while companies need to be able to attract top talent, the SEC's rules also must be clear. "You cannot have capital formation unless investors have confidence in our capital markets," said Hensarling.

Title XXVII would require the SEC to examine existing Rule 10b5-1 for gaps in coverage in light of insiders' current trading plan practices.

Title XXVII would require the SEC to examine existing Rule 10b5-1 for gaps in coverage in light of insiders' current trading plan practices. Specifically, the SEC would have to consider 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 Rule 10b5-1 would clarify existing limits on insider trading, alter companies' desire to be public companies, impact capital formation, or affect the ability to recruit executives. The Commission would have to report to Congress within one year of enactment and, upon completing the study, conduct a notice and comment rulemaking to revise Rule 10b5-1.

Rule 10b5-1 mechanics and best practices. Exchange Act Rule 10b5-1 clarifies when trading occurs "on the basis of" material, nonpublic information, for purposes of liability under Exchange Act Section 10(b) and Rule 10b-5. As a result, "on the basis of" means a person trading an issuer's securities who was aware of the material, nonpublic information when he or she made the trade. Rule 10b5-1 explains that Section 10(b) and Rule 10b-5 address, among other things, the trading of an issuer's securities on the basis of material, nonpublic information in breach of a duty of trust or confidence owed to the issuer, to the issuer's shareholders, or to any other person who is the source of such information.

However, Rule 10b5-1(c) provides an affirmative defense to insider trading liability for persons who execute trading plans that meet the requirements of the rule. A person can avoid trading "on the basis of" material, nonpublic information if, before learning of the information, they enter into a binding contract to trade the securities, instruct another to trade the securities for the instructing person's account, or adopt a written trading plan. The contract, instruction, or plan must, among other things, not allow the person to later influence how, when, or whether to trade the securities. However, trades are not pursuant to a contract, instruction, or plan if the person who entered into the contract, instruction, or plan altered or deviated from it. Moreover, the affirmative defense applies only when a contract, instruction, or plan was entered into in good faith and not to evade Rule 10b5-1. A separate provision in Rule 10b5-1 extends the affirmative defense to entities that meet certain requirements.

The SEC also has issued guidance that clarifies how to apply Rule 10b5-1 (See, C&DIs regarding Exchange Act Rules General Questions; Exchange Act Rule Particular Questions; and C&DIs regarding Section 16). For example, Question 120.17 states that termination of a trading plan by a person while aware of material, nonpublic information but not engaging in planned securities transactions would not result in liability because the fraud must "'coincide[]' with a securities transaction" (citation omitted). Question 120.19 notes that a new contract, instruction, or plan established after cancelling an old plan would be judged on the facts and circumstances regarding whether the new contract, instruction, or plan was established in good faith and not to evade Rule 10b5-1. Question 120.24 clarifies when something must be in writing; specifically, Rule 10b5-1 requires a trading plan to be written (but not a binding contract or instruction), while a writing is also required for a formula or algorithm, or computer program, for determining amounts of securities, prices, and dates for trades.

Rule 10b5-1 can be challenging to apply in practice. As a result, several best practices have evolved around ensuring compliance:

- Establish trading plans during company trading windows.
- Do not execute the first trade under a plan for at least three weeks.
- Keep plan changes or cancellations to a minimum.
- Avoid multiple, overlapping plans.
- Pre-clear plans with the company's counsel or its compliance officer.

Many companies also disclose trading plans via Form 8-K to lessen public criticism of an executive's trading in the company's stock. A company insider also may indicate the presence of a Rule 10b5-1 plan on Form 4. [See, Steven Mark Levy, Regulation of Securities: SEC Answer Book at Q20:30 and Q20:31.]

Exchanges

The JOBS and Investor Confidence Act would address national securities exchanges in two significant ways. For one, the bill would create a framework by which persons can register as national securities exchanges solely to trade venture securities. The idea of venture exchanges was proposed by former SEC Commissioner Daniel Gallagher in 2013 in a speech he delivered to the FIA Futures and Options Expo in Chicago. In that

speech, Gallagher posited that venture exchanges were "not new or unprecedented," citing Canadian and U.K. incubator exchanges. Gallagher went on to explain the purpose of venture exchanges: "The key to establishing venture exchanges is to create a platform which could encourage smaller companies to enter our public markets while at the same time providing adequate protection for investors. The hope is that companies would be able to get public financing through listing on these exchanges and then be able to move onto more robust and liquid markets in the future."

Another provision in the JOBS and Investor Confidence Act would direct the Commission to adopt a rule clarifying the meaning of "facility" as that term is used in Exchange Act Section 3(a)(1). The Commission has previously offered clarity on other terms of art within this part of the Exchange Act via Exchange Act Rule 3b-16.

Venture exchanges. Title XX of the JOBS and Investor Confidence Act contains the Main Street Growth Act (H.R. 5877), sponsored by Rep. Tom Emmer (R-Minn), and would amend Exchange Act Section 6 to provide that a person may apply to the Commission to register as a national securities exchange for the purpose of trading venture securities (a national securities exchange may register a listing tier to be treated as a venture exchange). For an exchange that is a registered national securities exchange on the date of enactment, its election to have a venture exchange would be effective no earlier than 180 days following enactment.

"Venture security" would mean the securities of: (1) early-stage growth companies that are exempt under Securities Act Section 3(b); (2) emerging growth companies; or (3) securities registered under Exchange Act Section 12(b), subject to a public float limit (no greater than $700 million) or a trading volume limit (75,000 shares or fewer within a 60-day period). "Early-stage growth company" would be defined to include an issuer that has never offered securities via a registered IPO and whose public float is no greater than that of a large accelerated filer (Exchange Act Rule 12b-2 defines "large accelerated filer" as an issuer with, among other things, $700 million in worldwide market value). A company's status as an "early-stage growth company" or a security's status as a "venture security" would not be lost immediately upon crossing the public float thresholds; under the definitions of both terms, the company or securities could retain their status until the later of 24 months after achieving public float greater than $2 billion (venture securities also have a trading volume limit of 100,000 shares within a 60-day period) or the end of a one-year extension following the 24-month period if granted by the venture exchange. As drafted, the public float provision regarding the 24-month period for an "early-stage growth company" is to be indexed for inflation, while the similar provision for "venture securities" is not.

For one, the bill would create a framework by which persons can register as national securities exchanges solely to trade venture securities.

The Commission would have 90 days after notice of a venture exchange application has been published for comment to either grant the registration or to institute denial proceedings. The Commission would approve a registration application if it finds that the application meets the requirements of the venture exchange provisions and any related regulations. A venture exchange would only be able to provide a marketplace for bringing together buyers and sellers of venture securities and could not extend unlisted trading privileges to any venture security. A venture exchange that is a listing tier of another national securities exchange could only allow trading in securities registered under Exchange Act Section 12(b) on a national securities exchange other than a venture exchange. Moreover, a venture exchange could, subject to the Exchange Act Rule 19(b) process, set increments for quoting venture securities and carry out periodic auctions of venture securities instead of providing continuous trading. Venture securities, however, could not be traded on non-venture securities exchanges, but a rule of construction would not require venture securities transactions to be effected on a national securities exchange.

Title XX also contains several investor protection provisions. For one, the Commission would have to adopt regulations specifying disclosure requirements for venture securities, including disclosure that would be sufficient to impart understanding of the unique characteristics of venture securities and, for a venture exchange that is a listing tier of another national securities exchange, disclosure that the venture exchange is distinct from the other national securities exchange. Second, Title XX would provide that securities listed on venture exchanges are not "covered securities" exempt from state laws under Securities Act Section 18(b) solely because of such arrangement; NASAA had objected to an earlier version of the legislation that would have preempted state laws. Third, the Commission could restrict trading in venture securities that does not occur on a national securities exchange. Lastly, the legislation expresses the sense of Congress that the Commission could use its general exemptive authority regarding venture exchanges and could establish an Office of Venture Exchanges within the Division of Trading and Markets.

"Facility." 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 Exchange Act Section 3(a). The underlying bill, the Exchange Regulatory Improvement Act (H.R. 3555), sponsored by Rep. Barry Loudermilk (R-Ga), urges the Commission to be more "transparent" in explaining what is meant by "facility," especially now that many exchanges operate businesses outside of the traditional listing and trading of securities.

Exchange Act Section 3(a)(1) defines "exchange" with reference to providing "facilities" to bring together buyers and sellers of securities. Exchange Act Section 3(a)(2) defines "facility" in the context of an "exchange" to mean:

> premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.

Although the Commission has issued a regulation to clarify the meaning of "exchange" (See, Exchange Act Rule 3b-16), it has not provided similar clarity regarding "facility." Representative Loudermilk's underlying bill, as originally drafted, would have amended the definition of "facility" to provide that "[s]uch term does not include any premises or property, or the right to use any premises, property, or service, to the extent such premises or property is used with respect to, or such right relates to use with respect to, a line of business the purpose of which is not to effect or report a transaction on an exchange." Under Title VIII of the JOBS and Investor Confidence Act, however, the Commission would instead have to adopt a regulation within one year of enactment to clarify "facility" while also using the facts and circumstances stated in the regulation to determine whether an exchange must submit a proposed rule for approval under Exchange Act Section 19.

Investment companies and advisers

The JOBS and Investor Confidence Act addresses a range of issues facing investment companies and investment advisers, although the tenor of the several provisions is capital formation. For example, one provision would codify and expand the definition of "accredited investor." Other provisions would clarify the meaning of "family office" and "venture capital fund" and afford legal status to crowdfunding vehicles and their advisers. Still other provisions would require the SEC to study the management company diversification threshold and to better understand why analysts tend not to cover smaller companies.

Family offices. Title X of the JOBS and Investor Confidence Act would clarify the status of family offices as accredited investors. The Dodd-Frank Act amended the Investment Advisers Act to clarify that family offices are not investment advisers. Under Advisers Act Section 202(a)(11), "investment adviser" means a person who, for compensation, is engaged in the business of advising others about investing in securities or

who is paid as part of a regular business for issuing analysis or reports regarding securities. Family offices exist to provide financial advice to a single family and are accorded such treatment if they satisfy the requirements of Advisers Act Rule 202(a)(11)(G)-1.

Under Title X, any family office or a family client of a family office would be deemed to be an "accredited investor" as that term is defined in Rule 501 of Regulation D. However, this provision would apply only if:

- the family office has more than $5 million in assets under management;
- the family office or family client was not formed specifically to acquire offered securities; and
- the family office's purchases are directed by a person with the financial and business experience needed to evaluate the propriety of a prospective investment.

Analyst coverage of smaller and emerging issuers. Title XXIV of the JOBS and Investor Confidence Act requires the Commission to conduct a study on why investment research is scarce for smaller companies, such as EGCs and other companies mulling IPOs, as compared to the availability of investment research for the largest companies. The study would, among other things, have to consider: (1) the demand and availability of such investment research; (2) conflicts of interest; (3) the impact of hard dollar and soft dollar arrangements; (4) the unique challenges faced by minority-, women-, and veteran-owned small issuers; (5) the impact of concentration among investment advisers and broker-dealers; (6) the SEC's Global Research Analyst Settlement Litigation Release dealing with claims of undue influence by investment banks on investment research; and (7) European Union directives, including the Markets in Financial Instruments (MiFID II). The Commission would have to report its findings and recommendations to Congress with six months of enactment.

Venture capital funds. Title XXV of the JOBS and Investor Confidence Act would require the Commission to clarify the definitions of "venture capital fund" and "qualifying investment" under Advisers Act Rule 203(*l*)-1. Title XXV would direct the Commission to clarify that "qualifying investments" of a private fund for purposes of Rule 203(*l*)-1(a) are "predominantly" investments acquired directly from a qualifying portfolio company. Title XXV also would require the Commission to clarify that "qualifying investment," as defined by Rule 203(*l*)-1(c), includes equity securities issued by a qualifying portfolio company regardless of whether the securities are directly acquired from the company or are acquired via a secondary acquisition.

Currently, the rule defines "venture capital fund" to mean a private fund that: (1) represents to investors that is has a venture capital strategy; (2) following the acquisition of an asset, holds no more than 20 percent of its aggregate capital contributions and uncalled committed capital in assets that are non-qualifying investments; (3) does not incur leverage above 15 percent of its aggregate capital contributions and uncalled committed capital and meets other limits on the renewability and duration of such leverage; (4) only issues securities that holders may not withdraw, redeem, or require the repurchase of except in extraordinary circumstances (holders may receive pro rata distributions made to all holders); and (5) is not registered with the Commission as an investment company and has not elected to be a business development company. The exiting definition of "qualifying investment" refers only to equity securities acquired directly by a private fund from a qualifying portfolio company.

Diversification threshold. Section 5(b)(1) of the Investment Company Act classifies management companies as open- and closed-end and diversified an undiversified. The section also provides that a diversified management company must have 75 percent of its total assets in comparatively safe securities (e.g., cash and government securities) and that the securities of a single issuer must not exceed 5 percent of total assets nor consist of securities that are more than 10 percent of the issuer's outstanding voting securities. Title XXVI of the JOBS and Investor Confidence Act would require the Commission to study whether the 10 percent diversification threshold hinders capital formation. The Commission, which may seek public comment on the study, would have to report to Congress on its findings within six months of enactment and post the results on the SEC's website.

Definition of "small business or small organization." Title XXVIII of the JOBS and Investor

Confidence Act would direct the Commission to amend the definition of "small business or small organization" as used in Advisers Act Rule 0-7 to incorporate alternative methods by which an entity may qualify as a small business or small organization, including whether the new standard should have a threshold based on the number of non-clerical employees at the entity. Currently, Rule 0-7 provides that "small business or small organization" means an investment adviser that: (1) has less than $25 million in assets under management; (2) has total assets under $5 million; and (3) does not control and is not controlled by an investment adviser with assets under management of $25 million or more or by a person (other than a natural person) with total assets of $5 million or more. The Commission would have to make the revision within one year of enactment.

Crowdfunding vehicle advisers. Securities-based crowdfunding became legal once the Commission adopted Regulation Crowdfunding under Title III of the JOBS Act. Title XXXII of the JOBS and Investor Confidence Act would take crowdfunding one step further by creating exemptions for crowdfunding vehicles and crowdfunding vehicle advisers. The underlying bill (H.R. 6380), sponsored by Rep. Patrick McHenry (R-NC), is a significant amendment by the author of the House version of the JOBS Act's crowdfunding title which, as enacted, contained the Senate version drafted by Sen. Jeff Merkley (D-Ore) (See, James Hamilton, Jumpstart Our Business Startups Act: Law, Explanation and Analysis, Wolters Kluwer Legal & Regulatory U.S. (April 2012), at ¶301).

"Crowdfunding vehicle" would be defined in the Investment Company Act to mean a company that acquires, holds, or disposes of a single crowdfunding company's securities, and meets other requirements regarding, among other things, the receipt of compensation and shared capital gains. Under an amendment to the Investment Advisers Act, "crowdfunding vehicle adviser" would be defined as an investment adviser that solely advises regarding crowdfunding vehicles (the definition excludes an investment adviser's affiliates' activities). Crowdfunding vehicle advisers would be required to register with the Commission via amendments to Advisers Act Section 203, although the Commission could adopt safekeeping and custody rules tailored for this type of adviser.

Moreover, Title XXXII would amend Exchange Act Section 12(g)(6) to codify an unconditional exemption for crowdfunding issuers with public float of less than $75 million; however, if the issuer's public float is zero under the calculation method provided, the issuer's securities would be unconditionally exempt under Section 12(g)(6) if the issuer's annual revenues are less than $50 million. Title XXXII also would make conforming amendments to Securities Act Section 4(a)(6).

Banking provisions

The JOBS and Investor Confidence Act also contains a number of banking-related provisions that had already been passed by the House Financial Services Committee or the full House.

Among other things, the JOBS and Investor Confidence Act seeks to: improve financial stability; provide regulatory relief to charitable organizations that make zero percent interest mortgage loans; permit the reporting of positive consumer-credit information; and strengthen the government's efforts to stop drug and human trafficking, as well as combating the financing of criminal organizations.

Full-file reporting. Section 201 of the Act, which was originally introduced by Rep. Keith Ellison (D-Minn) as H.R. 435, the Credit Access and Inclusion Act of 2017, would amend the Fair Credit Reporting Act (FCRA) to allow the reporting of certain positive consumer-credit information to consumer reporting agencies.

Specifically, the amendments would allow a person or the Department of Housing and Urban Development to report information related to a consumer's performance in making payments either under a lease agreement for a dwelling or pursuant to a contract for a utility or telecommunications service.

On the other hand, information about a consumer's usage of any utility or telecommunications service may only be reported to the extent that the information relates to payment by the consumer for that service or other terms of the provision of that service. Also, the amendments would not permit an energy utility firm, telephone company, or wireless provider to report a consumer's outstanding balance as late if the firm and the consumer have entered into a payment plan and the consumer is meeting the

obligations of that plan. Finally, state law would not be preempted with respect to furnishing to a consumer reporting agency information relating to the performance of a consumer in making payments pursuant to a contract for a utility or telecommunications service.

Section 201 would also establish that the civil liability provisions of the FCRA would not apply to a violation of the newly-added full-file reporting provisions.

To give effect to the full-file provisions, HUD would be required to issue regulations directing public housing agencies to develop procedures and capacity to ensure the complete and accurate reporting of data regarding tenants of public housing and families assisted under Section 8 of the United States Housing Act of 1937, and handle complaints with respect to that reporting. The regulations would need to be in place no later than eight months following the date of the enactment of the JOBS and Investor Confidence Act. Also, until those regulations are issued, the full-file reporting provisions would not apply to Section 8 housing lessees.

Finally, the GAO must report, within two years of the JOBS and Investor Confidence Act's enactment, on the consumer impact of the full-file reporting provisions.

The full-file provisions are intended to clarify regulatory uncertainty at the state level by establishing a furnishing and reporting environment that provides more information about a borrower. A committee report accompanying the Credit Access and Inclusion Act of 2017 noted that "some state regulators have told inquiring energy utility and telecommunications firms that they are not permitted to share customer payment data with consumer reporting agencies."

Living wills. A number of provisions of the JOBS and Investor Confidence Act address concerns regarding the resolution plan requirements found in Section 165 of the Dodd-Frank Act.

Frequency and agency review. Under Section 165 of the Dodd-Frank Act, bank holding companies (BHCs) with total consolidated assets of $250 billion or more and nonbank financial companies designated by the Financial Stability Oversight Council for supervision by the Federal Reserve periodically submit resolution plans to the Federal Reserve and the Federal Deposit Insurance Corporation. Each plan, commonly known as a "living will," must describe the company's strategy for rapid and orderly resolution in the event of material financial distress or failure of the company and include both public and confidential sections.

Section 1201 of the JOBS and Investor Confidence Act would amend the frequency of submitting living wills to the Fed and FDIC. Under the amendment, BHCs and nonbank financial companies would only have to submit a living will once every two years; current regulations generally require annual submission of resolution plans. Section 1201 would also require the Fed and FDIC to provide feedback to a company regarding its living will within six months.

In a committee report, it was noted that "H.R. 4292, as amended, is a measured and appropriate response to fix many of the challenges that financial institutions experience in their efforts to comply with the living will statutory regulatory mandates."

The increase in frequency and feedback provisions were originally passed by the House as H.R. 4292, the Financial Institution Living Will Improvement Act of 2017, which was introduced by Rep. Lee Zeldin (R-NY). In a committee report, it was noted that "H.R. 4292, as amended, is a measured and appropriate response to fix many of the challenges that financial institutions experience in their efforts to comply with the living will statutory regulatory mandates."

The changes made by Section 1201 are intended to implement recommendations made by the Treasury Department in its June 2017 report entitled "A Financial System That Creates Economic Opportunities: Banks and Credit Unions." The report recommended that institutions be provided a two-year submission cycle, and that the Federal Reserve complete reviews and

provide feedback of living wills proposals within six months of submission.

Unauthorized disclosure of financial information. The other change to the Dodd-Frank living will requirements is made by Section 1301 of the Act. That provision would establish criminal monetary penalties with respect to: an officer or employee of a federal financial regulatory agency who willfully makes an unauthorized disclosure of certain individually identifiable information; and a person who willfully requests or obtains that individually identifiable information under false pretenses. The monetary penalties, which total $5,000, are codified at 5 U.S.C. §552a.

Section 1301 was originally passed by the House as H.R. 4294, the Prevention of Private Information Dissemination Act of 2017. H.R. 4294 was introduced by Rep. David Kustoff (R-Tenn) in November 2017.

A committee report that accompanied H.R. 4294 noted that the in-depth information, such as trade secrets, that must be submitted as a living will has the potential to "move markets" and the criminal monetary penalties seek to "disincentivize the unauthorized disclosure of material, non-public information that financial regulators possess as a result of the living will requirements."

A committee report that accompanied H.R. 4294 noted that the in-depth information, such as trade secrets, that must be submitted as a living will has the potential to "move markets" and the criminal monetary penalties seek to "disincentivize the unauthorized disclosure of material, non-public information that financial regulators possess as a result of the living will requirements."

Nonbank stress tests. The stress test provisions of the Dodd-Frank Act would also be changed by the JOBS and Investor Confidence Act. Stress testing under the Dodd-Frank Act is a forward-looking exercise conducted by the Fed and financial companies supervised by the Fed to help assess whether institutions have sufficient capital to absorb losses and support operations during adverse economic conditions.

Section 1501 of the Act would eliminate the stress testing requirements for nonbank financial companies, such as investment companies and investment advisers registered with the Securities and Exchange Commission. Section 1501 is based on H.R. 4566, the Alleviating Stress Test Burdens to Help Investors Act which was introduced by Rep. Bruce Poliquin (R-Maine) in December 2017.

Section 1501 also provides that the SEC and Commodity Futures Trading Commission may issue regulations requiring financial companies for which they are the primary financial regulatory agency to conduct periodic stress tests, including available liquidity, of these companies under adverse economic conditions.

A committee report accompanying H.R. 4566 provided that the elimination of the stress testing requirements "make[s] sense for the asset management industry" since their agency-based business model is different than the principal-based business model of banks. The report added that "to the extent that systemic risks arise from the asset management industry, prudential regulation of asset management is unlikely to be the most effective regulatory approach for mitigating these risks."

Capital and options markets. To remedy a number of problems regarding the capital treatment of certain centrally cleared options, Title XVIII of the JOBS and Investor Confidence Act would require the Office of the Comptroller of the Currency, Fed, and FDIC to issue a proposed rule, and to finalize that rule within 360 days of enactment, to adopt a methodology for calculating the counterparty credit risk exposure under derivative contracts pursuant to risk-based and leverage-based capital rules.

Title XVIII of the Act is based on H.R. 5749, the Options Markets Stability Act, which was introduced by Rep. Randy Hultgren (R-Ill) in May

2018 and approved by the House on July 10, 2018. Following House passage of H.R. 5749, Hultgren noted, "Healthy options markets provide ample opportunity for investors to plan for the future and hedge risk. The market volatility seen in equity markets earlier this year exposed the extent to which existing rules are restricting liquidity when it is needed the most. Unfortunately, market-makers who provide liquidity for listed options are indirectly constrained by bank capital rules from fulfilling their role in maintaining price stability, leading to less liquidity and higher costs for investors who want to hedge risk."

Title XVIII would address a number of issues related to the agencies' implementation of the Basel III capital framework. Under their regulations, the agencies established a supplementary leverage ratio (SLR) that requires certain larger banking organizations to include leverage exposures that are both on and off the bank's balance sheet, which includes exposures arising from futures, options, and other derivative transactions.

An October 2017 report issued by the Treasury Department on capital markets identified the SLR as a risk-insensitive capital rule that is discouraging central clearing and increasing costs to customers.

The provisions of Title XVIII would also address the Current Exposure Method (CEM), under the agencies' capital rules, that is used to calculate charges for cleared options. A committee report accompanying H.R. 5749 indicated that the CEM "Fails to account for the delta of options and fails to fully recognize the offsetting of positions with opposite economic exposure—i.e., long positions and short positions." The delta of options is the market sensitivity as to how the value of an option will respond differently to changes in the price of the option's underlying shares.

In issuing their rule, the OCC, Fed, and FDIC would be required to consider a number of factors, which include, among other things:

- the availability of liquidity provided by market makers during times of high volatility in the capital markets;
- the spread between the bid and the quote offered by market makers;
- the safety and soundness of the financial system and financial stability, including the benefits of central clearing;
- the economic value of delta weighting a counterparty's position and netting of a counterparty's position; and
- barriers to entry for depository institutions, depository institution holding companies, affiliates thereof, and entities not affiliated with a depository institution or depository institution holding company to centrally clear exchange-listed derivatives or options on behalf of market makers.

Following House passage of H.R. 5749, Hultgren noted, "Healthy options markets provide ample opportunity for investors to plan for the future and hedge risk. The market volatility seen in equity markets earlier this year exposed the extent to which existing rules are restricting liquidity when it is needed the most.

TRID reform. Title XXI of the JOBS and Investor Confidence Act would provide regulatory relief to charitable organizations that provide housing assistance. Title XXI is based on H.R. 5953, the Building Up Independent Lives and Dreams (BUILD) Act, which was introduced by Rep. Barry Loudermilk (R-Ga) in May 2018 and passed by a voice vote in the House on July 10, 2018.

Specifically, Title XXI would amend the Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA) to allow bona fide nonprofit organizations—that are eligible for tax-exempt charitable donations and are making zero percent interest mortgage loans—to choose whether to use the truth in lending (TIL), good faith estimate (GFE), and HUD–1 forms in place of the TILA–RESPA Integrated Disclosure (TRID) forms established under the Dodd-Frank Act. The TRID forms were implemented by the 2013 final rule issued by the Consumer Financial Protection Bureau.

The changes to the TRID requirements found in TILA and RESPA would allow nonprofit organizations to use the three mortgage disclosure forms since certain sections of the TRID forms concerning loans and adjustable rate mortgages may be applicable to traditional mortgage lenders, but are not relevant to a nonprofit organization. A committee report accompanying H.R. 5953 noted that "many charitable organizations have difficulty with fulfilling the needed compliance related to origination and servicing of their loans."

In addition to the statutory changes, Title XXI requires the CFPB Director to issue regulations within 180 days of enactment as may be necessary to implement changes.

International insurance standards. To allay concerns over the current U.S. negotiating platform for international insurance agreements, Title XIV of the JOBS and Investor Confidence Act, the International Insurance Standards Act of 2018, would provide increased oversight and transparency for those international negotiations. Under the Dodd-Frank Act, the director of the Federal Insurance Office is charged with representing the interests of U.S. insurers during the negotiation of international agreements and advising the Office of the U.S. Trade Representative during trade negotiations. Some critics have claimed that this negotiation platform could be used as a "back-door" method to implement European insurance standards in the United States.

Specifically, the International Insurance Standards Act of 2018 would require negotiators of international insurance agreements to oppose any proposal that is inconsistent with existing federal and state laws. Title XIV of the Act would also require negotiators to consult with state insurance commissioners and Congress. The bill also would provide Congress with a process to disapprove of any international insurance agreement.

The International Insurance Standards Act was originally introduced as H.R. 4537 by Rep. Sean Dufy (R-Wis) in December 2017 and passed in the House by a voice vote in July 2018. At the time of the July 2018 vote, Duffy said, "In this chamber we should not have some executive appointee negotiate a trade deal that undermines our state based model."

Prior to the House vote on H.R. 4537, Rep. Ed Royce (R-Calif) voiced opposition to the bill. He noted, "This bill is not only unconstitutional but anti-competitive; hampering our ability to represent U.S. interests in international fora. Supporters of this bill, including many State regulators represented by the National Association of Insurance Commissioners, appear more interested in winning an imaginary turf war than acting in the best interests of U.S. consumers. Fifty-plus State regulators and their trade association simply do not have the authority or capacity to engage in international negotiations in a global economy."

SBIC investments. Title VII of the JOBS and Investor Confidence Act seeks to grow the amount of capital available to small businesses within the Small Business Investment Company (SBIC) program at the Small Business Administration. Title VII is based on H.R. 2364, the Investing in Main Street Act, which was introduced by Rep. Judy Chu (D-Calif).

Specifically, Title VII of the Act would increase the amount of capital and surplus that a financial institution or a federal savings association can invest in an SBIC from 5 percent to 15 percent. To invest more than 5 percent of capital and surplus in an SBIC, a financial institution or a federal savings association would be required to obtain prior approval from its primary federal regulator.

Financial crimes. A number of provisions of the JOBS and Investor Confidence Act address drug and human trafficking, call for a national strategy for combating the financing of criminal organizations, and provide a Bank Secrecy Act safe harbor for "keep open" letters.

Human trafficking. Recognizing that over $150 billion in illegal profits are made from forced labor each year and $99 billion are earned from the victims of sexual exploitation, Title VI of the JOBS and Investor Confidence Act adds provisions to the Trafficking and Violence Protection Act of 2000 that are intended to help law enforcement and financial institutions identify and report suspected human traffickers so that they can be prosecuted to the full extent of the law without relying entirely on testimony from victims. The provisions of Title VI were originally introduced by Rep. Ed Royce (R-Calif) as H.R. 2219, the End Banking for Human Traffickers Act of 2017.

The Title VI provisions would:

- Add the Secretary of the Treasury to the President's Interagency Task Force to Monitor and Combat Trafficking (PITF), even though

the PITF's website lists the Department of the Treasury as one of the member agencies.

- Require the Federal Financial Institutions Examination Council to review and enhance, where necessary, training and procedures to improve the ability of anti-money laundering programs to target human trafficking operations and procedures for referring potential human trafficking cases to the appropriate law enforcement agency; and to determine, as appropriate, whether requirements for financial institutions are sufficient to detect and deter money laundering relating to severe forms of trafficking in persons.
- Require the PITF to report to Congress on efforts by the federal government and financial institutions related to human trafficking, including feedback and recommendations related to successful anti-human trafficking programs currently in place that may be suitable for broader adoption by similarly situated financial institutions, human trafficking-related information sharing, and other efforts to detect and deter money laundering related to human trafficking.

Other provisions added by Title VI would require:

- the Treasury Secretary to designate an office within the Office of Terrorism and Financial Intelligence that coordinates efforts to combat the illicit financing of human trafficking; and
- the State Department, for the purposes of rating countries' commitment to the minimum standards for the elimination of trafficking as part of its annual Trafficking in Persons Report, to assess whether foreign governments have in effect a framework to prevent financial transactions involving the proceeds of severe forms of human trafficking.

TCO strategy. Title XVI of the JOBS and Investor Confidence Act would build upon the U.S. intelligence community's 2010 comprehensive review of international organized crime and the Obama Administration's *2011 Strategy to Combat Transnational Organized Crime*, which concluded that transnational organized crime has expanded dramatically in size, scope, and influence, and that it poses a significant threat to national and international security.

Specifically, Title XVI would require the President, acting through the Treasury Department, and in consultation with the Departments of Defense, Homeland Security, Justice, State, and the Office of the Director of National Intelligence, to produce a strategy to address transnational criminal organizations (TCOs) within one year and update it every two years.

The national strategy must:

- identify and assess the most significant transnational organized crime threats;
- identify the individuals, entities, and networks that financially support or facilitate transnational organized criminals and assess the scope of such support;
- assess the methods by which transnational organized crime groups launder illicit proceeds;
- describe the roles of U.S. agencies and departments to combat the financing and financial facilitation of transnational organized crime groups; and
- review current efforts and proposed changes to combat the financing or financial facilitation of transnational organized crime.

Title XVI of the Act is based on H.R. 4768, the National Strategy for Combating the Financing of Transnational Criminal Organizations Act, which was introduced by Rep. David Kustoff (R-Tenn) in January 2018 and passed by a voice vote in the House in March 2018.

A committee report accompanying H.R. 4768 noted that it would be the first law to require an assessment of a TCO strategy akin to the national strategy for combating terrorist and other illicit financing provisions found in Public Law 115–44, which President Trump signed into law on August 2, 2017, as part of the Countering America's Adversaries Through Sanctions Act.

FIND Trafficking Act. Title XXIII of the JOBS and Investor Confidence Act would direct the GAO to report on the use of virtual currencies and online marketplaces in sex and drug trafficking.

Title XXIII of the Act is based on H.R. 6069, the Fight Illicit Networks and Detect Trafficking Act or the FIND Trafficking Act which was introduced by Rep. Juan Vargas (D-Calif) in June 2018.

The GAO's report would need to assess, among other things:

- how online marketplaces, including the dark web, are being used as platforms to buy, sell, or facilitate the financing of goods or services associated with sex trafficking or drug trafficking;

- how financial payment methods, including virtual currencies and peer-to-peer mobile payment services, are being utilized by online marketplaces to facilitate the buying, selling, or financing of goods and services associated with sex or drug trafficking;
- how illicit funds that have been transmitted online and through virtual currencies are repatriated into the formal banking system of the United States through money laundering or other means;
- the participants throughout the entire supply chain that participate in or benefit from the buying, selling, or financing of goods and services associated with sex or drug trafficking;
- federal and state agency efforts to impede the buying, selling, or financing of goods and services associated with sex or drug trafficking destined for, originating from, or within the United States, including efforts to prevent the proceeds from sex or drug trafficking from entering the United States banking system;
- how virtual currencies and their underlying technologies can be used to detect and deter these illicit activities; and
- to what extent the immutable and traceable nature of virtual currencies can contribute to the tracking and prosecution of illicit funding.

The provisions of Title XXIII complement the work of the President's Commission on Combating Drug Addiction and the Opioid Crisis, which issued its final report on Nov. 1, 2017. The report noted the Administration "will employ tools to disrupt the flow of illicit drugs into our country, and reduce drug trafficking domestically." The final report recommended to the President that "federal law enforcement agencies expressly target Drug Trafficking Organizations and other individuals who produce and sell counterfeit pills, including through the internet."

"Keep open" letters. Finally, Title XIX of the JOBS and Investor Confidence Act provides a safe harbor, under the Bank Secrecy Act, to financial institutions that keep an account open at the written request of a federal, state, tribal, or law enforcement agency so that authorities may monitor transactions and build stronger cases against money launderers, terrorist financiers, human traffickers, and any number of other illicit actors moving money through the U.S. financial system. These requests are known as "keep open" letters.

In practice, law enforcement agencies are supposed to provide a written notice to a financial institution that they requested that an account be kept open, but that is currently not guaranteed. Without the written notice, a financial institution faces the risk of enforcement actions, as well as fines and penalties from banking or other regulators if they allow an account to be used for criminal purposes.

Under the safe harbor, no federal department or agency may take an adverse supervisory action with respect to the financial institution for keeping an account open for criminal investigative purposes.

Title XIX is based on H.R. 5783, the Cooperate with Law Enforcement Agencies and Watch Act of 2018, which was introduced by Rep. French Hill (R-Ark) in May 2018.

Conclusion

Since the enactment of the Dodd-Frank Act in 2010, and the enactment of the JOBS Act in 2012, members of Congress have worked, over multiple sessions of Congress and largely behind the scenes, to craft bipartisan correction bills to fix a small number of gaping holes in prior financial and capital markets reform legislation while also making changes to "right size" other provisions and adding still more provisions to expand upon existing relief to securities issuers and banks. The recently enacted Economic Growth, Regulatory Relief, and Consumer Protection Act exemplified nearly six years of bipartisan efforts to agree on a relief package for community banks.

The JOBS and Investor Confidence Act, if enacted, would embody broad bipartisan support for legislation aimed at helping America's smaller companies to grow without being overly burdened by complex securities and banking regulations. However, because the JOBS and Investor Confidence Act was put forward as an amendment to a previously-passed Senate bill, the legislation will have to go back to the Senate for further action, which could result in further amendments that could dim its prospects for enactment.

The Council of Institutional Investors, for example, praised the House-led securities and banking package but warned Senate amendments

could hinder enactment: "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."

SEC Chairman Jay Clayton has announced that the agency's staff plans to hold a roundtable to discuss the proxy process. Although the roundtable agenda has yet to be set, the chairman's statement raised five questions regarding proxy advisory firms that broadly mirror legislation (H.R. 4015) introduced by Rep. Sean Duffy (R-Wis), which passed the House by a vote of 238-182. Meanwhile, the Treasury Department's report on capital markets cited a GAO study and the SEC's proxy concept release on the growing concerns about proxy advisers' influence, but the report did not take a position on proxy advisory firm legislation and instead recommended further study and possible regulatory action.

A sizeable backlog of Senate business also could delay Senate consideration of the JOBS and Investor Confidence Act. Senate Majority Leader Mitch McConnell has already announced that he has cancelled much of the Senate's traditional August recess. Moreover, the Senate will soon hold confirmation hearings for Judge Brett Kavanaugh of the D.C. Circuit, who has been nominated to replace retiring Justice Anthony Kennedy on the Supreme Court.

Nevertheless, the JOBS and Investor Confidence Act is not likely to be the last attempt by this Congress to deal with capital markets issues. For example, the House and Senate resolved their differences over the John S. McCain National Defense Authorization Act for Fiscal Year 2019. Title XVII of the NDAA conference report contains the Foreign Investment Risk Review Modernization Act (FIRRMA), which would change how the Committee on Foreign Investment in the United States (CFIUS) reviews mergers and acquisitions that involve foreign acquirers of U.S. businesses. Specifically, "covered transaction" would be expanded to include real estate transactions for properties near to U.S. military installations, investments in U.S. businesses that own or operate critical infrastructure, changes in the rights of foreign persons regarding a U.S. business, and transactions designed or intended to evade CFIUS review. The Administration backed CFIUS reforms, but had objected to provisions in an earlier version of the NDAA that would have upset an Administration decision regarding a single company. The House passed the conference report by a vote of 359-54 and the Senate passed it by a vote of 87-10.

Moreover, the full House may yet address financial technology issues via legislation that would create a federal government–private sector task force to consider a variety of matters, including digital currencies. The House FSC reported the Financial Technology Protection Act (H.R. 5036), sponsored by Ted Budd (R-NC), by a vote of 57-0. The recently-released Treasury report on nonbank financial firms and fintech issues may influence future, broader fintech legislative efforts. As with the NDAA, securities and banking practitioners will need to monitor developments as the 115th Congress draws to a close because it remains possible that individual pieces of legislation could move forward as stand-alone bills, or they could be attached to other must-pass bills later in the year.