# Securities Regulation Daily Wrap Up, EXCHANGES AND MARKET REGULATION—House committee takes views on capital formation bills, (Apr. 29, 2015)

Click to open document in a browser

By Mark S. Nelson, J.D.

The House Financial Services Committee's Subcommittee on Capital Markets and Government Sponsored Enterprises held a hearing today that focused on a dozen bills designed to help improve capital formation in U.S. markets. The bills are intended to build on bipartisan items in the Jumpstart Our Business Startups (JOBS) Act and to update the Dodd-Frank Act to deal with some types of private fund advisers and derivatives end users, and to provide for refunds of some overpayments made to the SEC. A committee memorandum suggests the range of topics covered by the bills within these larger categories.

**Small companies.** Under the Improving Access to Capital for Emerging Growth Companies Act (H.R. ----), legislators would extend the time during which a emerging growth company (EGC) retains this status under Securities Act Sec. 6(e)(1). The bill also would amend the JOBS Act to require the SEC to revise the instructions to Form S-1 to let EGCs omit historical period financial information that must otherwise be disclosed under Regulation S-X. Likewise, the Small Company Simple Registration Act of 2015 (H.R. 1723) would let smaller reporting companies incorporate by reference certain information in a Form S-1.

Shane Kovacs, executive vice president, chief financial officer and head of corporate development, PTC Therapeutics, Inc., speaking on behalf of the Biotechnology Industry Organization (BIO), said BIO supports many of the bills introduced in the House that are aimed at improving capital formation for smaller companies.

Kovacs said the JOBS Act, and bills to amplify its provisions, would be especially helpful to biotechnology firms. "This important law allows enhanced access to investors, increasing the capital potential of a public offering, and then reduces the regulatory burden on emerging growth companies, decreasing the amount of capital diverted from R&D. This one-two punch is critical for biotech innovators and has increased the viability of the public market for growth stage businesses looking to fund their capital-intensive development programs."

The Reforming Access for Investments in Startup Enterprises Act of 2015 (RAISE Act of 2015) (H.R. 1839) would amend Securities Act Sec.4 to exempt additional transactions from the registration requirement. Specifically, the bill deals with transactions that involve purchasers who are all accredited investors. Securities sold in reliance on this provision in transactions that incorporate general solicitation or advertising would be limited to sales done via platforms that can only be used by accredited investors.

Thomas Quaadman, vice president, Center for Capital Markets Competitiveness at the U.S. Chamber of Commerce, expressed support for H.R. 1839 because it could help to ensure that private companies have liquid secondary markets. "While past court decisions have had the effect of allowing the resale of certain private offerings, restricted securities remain an illiquid market and could benefit from a modernization of current SEC rules," said Quaadman.

**XBRL tagging.** The Small Company Disclosure Simplification Act (H.R. 1965) spurred a lively debate about XBRL's future. The bill would exempt EGCs and other smaller companies from using eXtensible Business Reporting Language (XBRL) in financial statements and other periodic reports filed with the SEC. The exemptions would last for up to five years, or two years following the SEC's determination (via an order) that the benefits of these companies using XBRL outweigh the costs of compliance.

Theresa A. Gabaldon, Lyle T. Alverson professor of law at The George Washington University Law School, testified that the exemption is a "step backward." She emphasized how XBRL will get less costly to use the more widely it is adopted. "It may even put EGCs that don't file in XBRL at a disadvantage if investors can acquire information about other issuers more easily."

***©2015 Wolters Kluwer. All rights reserved.***
***Subject to Terms & Conditions: http://researchhelp.cch.com/License_Agreement.htm***

The XBRL discussion came on the same day the SEC proposed new executive compensation rules that would expand the use of XBRL, for the first time, to proxy and information statements. But the proposed SEC rules would provide for a phase-in period, especially for smaller companies.

**Derivatives, brokers, advisers.** The remaining bills, while broadly supportive of small company capital formation, also cover diverse topics. H.R. 1317 would amend the Commodity Exchange Act and the Securities Exchange Act to clarify an exception from the swaps and security-based swaps clearing requirements for affiliates.

Thomas C. Deas, vice president and treasurer, FMC Corporation, testifying on behalf of the Coalition for Derivatives End-Users, said the coalition "strongly" backs H.R. 1317. "This [bill] would also free CFTC staff from having to monitor end-users' compliance with the no action guidance they had to update most recently on November 26, 2014."

Yet another swaps bill, the Swap Data Repository and Clearinghouse Indemnification Correction Act of 2015 (H.R. 1847), would likewise amend the Commodity Exchange Act to clarify that the CFTC must get a written confidentiality agreement from certain entities before sharing swaps data with them. The bill also would amend both the Commodity Exchange Act and the Securities Exchange Act to ensure the confidentiality of data shared by swap data repositories and security-based swap data repositories with other entities.

Under the Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2015 (H.R. 686), M&A brokers, subject to certain exceptions, would be exempt from registration as broker-dealers under Exchange Act Sec. 15(b). The bill defines "M&A broker" to mean any person engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of an eligible privately held company.

But M&A broker status is limited. Specifically, an M&A broker must reasonably believe any person who acquires securities in a deal will actively manage the company and that any person offered securities will get access to relevant financial statements. An "eligible privately held company" is a company that does not have a class of securities registered under Exchange Act Sec. 12 and that has pre-tax earnings under $25 million and /or gross revenues under $250 million.

The SBIC Advisers Relief Act of 2015 (H.R. 432) clarifies an exclusion for advisers of small business investment companies (SBICs) under investment Advisers Act Sec. 203. Speaking on behalf of the Small Business Investor Alliance, Gayle G. Hughes, partner and founder, Merion Investment Partners, said this bill could solve problems that can arise during the wind-down phase of an SBIC where small amounts raised for an earlier fund that will close over several years might be combined with larger sums being raised for a new fund for purposes of triggering registration requirements.

Still other bills aim to improve regulatory transparency or to make conforming amendments that help to implement related statutory revisions. For one, the Disclosure Modernization and Simplification Act of 2015 (H.R. 1525) would direct the SEC to update Regulation S-K within a fixed period of time. H.R. 1975 would mandate refunds or credits of overpayments to the SEC made under Exchange Act Sec.31.

The Holding Company Registration Threshold Equalization Act of 2015 (H.R. 1334) would make conforming amendments to the Securities Exchange Act. Lastly, H.R. 1675 would direct the SEC to amend its regulations to increase the thresholds for certain compensatory benefit plans.

Companies: Small Business Investor Alliance; Merion Investment Partners; FMC Corporation; Coalition for Derivatives End-Users; Center for Capital Markets Competitiveness; U.S. Chamber of Commerce; PTC Therapeutics, Inc.; Biotechnology Industry Organization

LegislativeActivity: CommodityFutures Derivatives DoddFrankAct ExchangesMarketRegulation FederalPreemption FormsFilings InvestmentAdvisers JOBSAct RiskManagement Swaps

***©2015 Wolters Kluwer. All rights reserved.***
***Subject to Terms & Conditions: http://researchhelp.cch.com/License_Agreement.htm***