

House Passes Two Bipartisan Bills to Facilitate Securities Offerings

November 3, 2017

Bills Would Expand Testing the Waters, Codify Confidential Submission of Draft Registration Statements and Modify Accredited Investor Definition

On November 1, the House passed two bills designed to encourage capital formation by extending JOBS Act testing-the-waters provisions to all companies, codifying the SEC's earlier expansion of confidential submission of draft registration statements by a non-emerging growth company for its IPO and during the one-year period after going public, and modifying the definition of an accredited investor to make more individuals eligible to participate in private placements. The bills were passed on a bipartisan basis and echo proposals that were part of the Financial Choice Act passed by the House in June 2017 and the Treasury Department's recent regulatory reform report on capital markets. We expect the bills would likely be passed and signed into law if they reach the Senate floor for a vote.

H.R. 3903, the Encouraging Public Offerings Act of 2017, would expand certain JOBS Act "IPO on-ramp" provisions by permitting non-EGCs to engage in communications with institutional investors prior to the filing of a registration statement in order to gauge investor interest in an offering and by providing for confidential submission of registration statements in connection with an IPO and during the one-year period after going public.

The House bill would permit all issuers (not just EGCs) and their authorized persons to test the waters with QIBs and other institutional accredited investors prior to public filing of a registration statement. This would provide flexibility to non-EGCs both before and after going public to assess investor interest in a potential securities offering, including through wall-cross procedures that otherwise would not have been available until the issuer had a registration statement on public file. The House bill would allow the SEC to adopt rules that impose additional conditions or requirements for non-EGCs on testing the waters so long as the SEC reports to Congress its findings underlying the basis for any proposed rules prior to such rulemaking.

While the Division of Corporation Finance has recently expanded its non-public review process to permit non-EGCs to submit IPO draft registration statements on a confidential basis and to permit all companies to submit draft registration statements on a confidential basis for one year post-IPO (see our [client memo](#)), the statutory confidential submission process in the House bill would (i) codify this so that the SEC cannot change its policy in the future, and (ii) allow for a company's draft registration statement to be protected from disclosure under the Freedom of Information Act. However, for follow-on offerings during the one-year period post-IPO, the House bill would not provide meaningful incremental flexibility for companies because it would require public filing of the registration statement at least 15 days prior to the start of a road show (or the date of registration statement effectiveness where no road show is conducted). By contrast, current SEC guidance requires a public filing just 48 hours prior to effectiveness. The House bill would allow the SEC to adopt rules that impose additional conditions or requirements for confidential submission of draft registration statements so long as the SEC reports to Congress its findings underlying the basis for any proposed rules prior to such rulemaking.

H.R. 1585, the Fair Investment Opportunities for Professional Experts Act, would amend the statutory definition of accredited investor to include licensed or registered brokers and investment advisors and any person determined by SEC regulation to have professional knowledge related to a particular investment through education or job experience that is verified by FINRA or an equivalent self-regulatory

organization, and would codify the \$1 million net worth test (adding an inflation adjustment every five years) and the \$200,000 income test for natural persons (or \$300,000 for joint spousal income) in the statutory definition.

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