Capital Markets Alert

Skadden

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House Passes Bipartisan Legislation Intended to Ease Capital Formation

Bills would extend "testing the waters" to all issuers, codify SEC Staff guidance on nonpublic review of draft registration statements and expand the "accredited investor" definition.

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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On November 1, 2017, the House of Representatives passed two bills intended to ease regulatory burdens on capital formation. The bills would amend the Securities Act of 1933 (Securities Act) to extend the "testing the waters" provisions and confidential draft registration statement process under the Jumpstart Our Business Startups (JOBS) Act that previously applied only to emerging growth companies (EGCs) to all issuers of securities and expand the statutory definition of "accredited investor." Each bill passed by a wide, bipartisan margin. This will increase the prospects that each will be considered in the Senate as part of financial reform legislation, which may be considered as soon as early 2018.

H.R. 3903, titled the Encouraging Public Offerings Act of 2017, would extend certain JOBS Act IPO-related accommodations to *all* issuers, not just EGCs. Specifically, the bill would amend Section 5(d) of the Securities Act to permit any issuer to "test the waters" by meeting with qualified institutional buyers (QIBs) and other institutional accredited investors prior to (or after) the filing of a registration statement in order to gauge those investors' interest in an offering.

The bill also would permit *any* issuer (not just an EGC) (i) before its IPO date, to confidentially submit a draft registration statement to the SEC for nonpublic review prior to any public filing; and (ii) within the one-year period following its IPO or its registration of a class of securities under Section 12(b) of the Securities Exchange Act of 1934, to confidentially submit to the SEC a draft registration statement for nonpublic review prior to any public filing. The provisions for the nonpublic review process codify into statute recently adopted SEC Staff practices regarding draft registration statements except as described herein. In this regard, an initial confidential draft registration statement and all subsequent nonpublic draft submissions must be publicly filed with the SEC at least 15 calendar days before any road show (or at least 15 calendar days prior to the requested effective date of the registration statement, if no road show). For follow-on offerings during the one-year period post-IPO, however, the House bill would require public filing of the registration statement at least 15 calendar days prior to the start of a road show (or the date of registration statement effectiveness where no road show is conducted), whereas the current SEC Staff guidance requires a public filing just 48 hours prior to effectiveness. If the bill was to be enacted with this disparity, we would welcome confirmation from the SEC Staff that the current, more liberal SEC Staff position would remain available to issuers conducting a follow-on offering during the one-year period post-IPO.

The bill gives the SEC the authority to adopt rules to impose additional conditions or requirements on "testing the waters" communications or draft registration statements by any issuer, other than an EGC, as it deems appropriate in the public interest or for the protection of investors. In such case, the SEC must submit a report to Congress prior to any rulemaking with a list of findings supporting the rulemaking.

H.R. 1585, titled the Fair Investment Opportunities for Professional Experts Act, would increase the pool of potential investors for private offerings by expanding the statutory "accredited investor" definition to account for educational or professional expertise, as verified by certain regulatory authorities. Specifically, the amended definition would include natural persons, regardless of their financial status under the net worth/net income tests, who hold certain securities-related licenses as well as natural persons whom the SEC determines, by regulation, to have qualifying education or job experience related to a particular investment (and whose education and job experience is verified by FINRA or an equivalent self-regulatory organization). The bill also would freeze the income test at $200,000 (or $300,000 including spousal income) but permit an inflation-adjustment to the net worth threshold (currently at $1 million) every five years, which would effectively repeal a Dodd-Frank Act mandate requiring each threshold to increase every four years. The bill would direct the SEC to modify the "accredited investor" definition under Regulation D to conform to these amendments.

Largely similar amendments were included as portions of the Financial CHOICE Act of 2017 — a more comprehensive bill targeting the Dodd-Frank Wall Street Reform and Consumer Protection Act — that was passed by the House of Representatives on June 8, 2017, on a 233-186 party-line vote (with all Democrats and one Republican voting against).[1] The Financial CHOICE Act of 2017 was never approved by the Senate and thus not enacted. In contrast, H.R. 3903 and H.R. 1585 are bipartisan bills and were passed unanimously and by a two-thirds majority, respectively. Both bills were received in Senate and referred to the Committee on Banking, Housing and Urban Affairs on November 2, 2017.

[1] See Skadden Corporate Finance Alert: "Financial CHOICE Act Aims to Open Capital Markets and Reduce Regulatory Burdens" (Jun. 12, 2017), available at https://www.skadden.com/insights/publications/2017/06/financial-choice-act-aims-to-open-capital-markets.

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