

ACCELERATING ACCESS TO CAPITAL ACT OF 2017

—
FEBRUARY 23, 2018.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed
—

Mr. HENSARLING, from the Committee on Financial Services,
submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 4529]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 4529) to direct the Securities and Exchange Commission to revise Form S-3 so as to add listing and registration of a class of common equity securities on a national securities exchange as an additional basis for satisfying the requirements of General Instruction I.B.1. of such form and to remove such listing and registration as a requirement of General Instruction I.B.6. of such form, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE AND SUMMARY

On December 1, 2017, Representative Ann Wagner introduced H.R. 4529, the “Accelerating Access to Capital Act of 2017”, to amend the Securities and Exchange Commission’s (SEC) Form S-3 registration statement for smaller reporting companies that have a class of common equity securities listed and registered on a national securities exchange. The bill allows these companies to register primary securities offerings exceeding one-third of the aggregate market value of voting and non-voting common equity held by non-affiliates of the registrant. It also allows smaller reporting companies without a class of common equity securities listed and registered on a national securities exchange to register primary securities offerings up to one-third of their public float.

BACKGROUND AND NEED FOR LEGISLATION

Allowing a greater number of smaller reporting companies to use the SEC's Form S-3 for securities offerings will reduce overly burdensome compliance costs associated with filing redundant paperwork and allow eligible companies to focus more resources on growing their businesses.

The Form S-3 is currently available to companies with a public float—*e.g.*, the amount of shares not held by private shareholders or employees—of at least \$75 million and a reporting history with the SEC of at least 12 months. Additionally, smaller reporting companies with a security traded on a national securities exchange may use Form S-3 but are limited to offerings that do not exceed one-third of their public float in a given year.

Filing a Form S-3 is more efficient than the more burdensome Form S-1. The Form S-3 is a short-form registration statement that allows forward incorporation by reference, as well as “off-the-shelf” offerings. Allowing forward incorporation by reference enables the company to simply, after the Form's effective date, reference any further documentation on the original Form S-3 document. Otherwise, companies must refile the registration form or file a post-effective amendment, which often results in the company having to delay any further security issuances and incur additional, unnecessary legal costs. In other words, using Form S-3 not only allows companies to avoid unnecessary compliance costs, but forward market incorporation and shelf registration leads to an efficiency that helps companies maximize market opportunities, and make it more likely that they will conduct more registered securities offerings.

Expanding the use of Form S-3 as provided in H.R. 4529 is long overdue. The original public float requirement for companies eligible to use Form S-3 to register primary offerings was \$150 million. In 1992, the SEC reduced the minimum float threshold to the current \$75 million based on an analysis of trading markets. In 2006, the SEC's Advisory Committee on Smaller Public Companies recommended that all reporting companies, regardless of public float or exchange-traded status, should be allowed to use Form S-3. The next year, the SEC proposed to expand the use of Form S-3 to all reporting companies, regardless of public float or exchange-traded status, and would have also imposed a 20% cap of public float on the amount of securities to be offered. The SEC determined that expanding Form S-3 eligibility was appropriate because most public filings now being filed on the SEC's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) database, allows widespread and direct accessibility to company disclosure. Ultimately, the SEC's final rule limited the Form S-3 to only companies traded on a national securities exchange but raised the cap to one-third of public float. In adopting the 2007 rule, the SEC stated that “extending Form S-3 short-form registration to additional issuers should enhance their ability to access the public securities markets.” After all, the “inability of these companies to utilize [Form S-3] limited their capacity to access the public securities markets and, because of the cost and lack of flexibility associated with [Form S-1], they either did not file registration statements . . . or were limited in the number that they filed.” Furthermore, the SEC estimated that

the offering reforms made in its 2007 release, including expanded Form S-3 eligibility, would decrease the compliance burden for companies by approximately 10,375 hours of in-house company personnel time (valued at \$1,816,000) and approximately \$12,450,000 for the services of outside professionals.

More recently, expanding the use of Form S-3 for all smaller reporting companies was a recommendation included in the SEC's Government-Business Forum on Small Business Capital Formation Final Report for 2012. At a Financial Services Subcommittee on Capital Markets hearing in 2014, Brian Hahn, Chief Financial Officer of GlycoMimetics, Inc., testifying on behalf of Biotechnology Industry Organization, confirmed the SEC's observations in 2007, when he noted that a reform like this "would increase the pool of companies eligible to use Form S-3 to register for an offering. Form S-3 is the most simplified SEC registration form, and utilizing it to conduct an offering contributes to the cost-savings goals of emerging companies." He continued that expanding access to Form S-3 "would increase small companies' access to public funds in an efficient and cost-effective manner that will stimulate capital formation."

Further, during a 2015 Capital Markets Subcommittee hearing, David Weild, CEO of Weild & Co., testified that, "the flexibility, speed and costs savings afforded by Form S-3 'Shelf Registrations' helps corporate issuers to improve their cost of equity capital."

One of the SEC's most important missions is to facilitate capital formation, though the Obama Administration largely neglected this mission in favor of extraneous and highly politicized regulatory undertakings. The current SEC Chairman, Jay Clayton, has stressed that a key part of his agenda is facilitating capital formation for all companies, which will provide expanded opportunities for investors, help grow the economy, facilitate innovation, and further job creation.

While the SEC has the statutory authority to enact many of these provisions unilaterally, earlier this year, the SEC did act to help facilitate capital formation by extending confidential filings to all companies, a provision that was included in H.R. 10, the Financial CHOICE Act. In addition to implementing CHOICE Act provisions, the Committee encourages the SEC to review the recommendations it has collected, including those from the Government Business Forum on Small Business Capital Formation, and act on those most likely to help small businesses access the capital markets so they can innovate, grow, and provide economic opportunities for their communities. Additionally, the Committee urges the Commission to act quickly to hire a Small Business Advocate to run the Office of the Advocate for Small Business Capital Formation pursuant to the SEC Small Business Advocate Act signed into law by President Obama in December 2016.

The SEC's near-term agenda may not accommodate the expansion of the Form S-3 to a larger group of companies that meet the conditions of the Form. If the SEC cannot act, it is incumbent upon Congress to Act to assist the SEC meet the entirety of its statutory mission. H.R. 4529 is a measured legislative response to address the inequities between large and small issuers. It is important to note that H.R. 4529 does not relieve any issuer of its obligations to file periodic and annual reports with the SEC. H.R. 4529 does

not exempt these issuers from registration under the Securities Exchange Act of 1934. Also, in order to be eligible to use Form S-3, a company must have timely filed 12 months of reports beforehand. Finally, H.R. 4529 does not eliminate or inhibit the SEC's ability to pursue securities fraud actions against a company, who takes advantages of the Form S-3 expansion, when H.R. 4529 becomes law.

HEARINGS

The Committee on Financial Services held hearings examining matters relating to H.R. 4529 on April 26, 2017, and April 28, 2017.

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on December 12, 2017, and December 13, 2017, and ordered H.R. 4529 to be reported favorably to the House without amendment by a recorded vote of 34 yeas to 26 nays (Record vote no. FC-124), a quorum being present.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. The sole recorded vote was on a motion by Chairman Hensarling to report the bill favorably to the House without amendment. The motion was agreed to by a recorded vote of 34 yeas to 26 nays (Record vote no. FC-124), a quorum being present.

Record vote no. FC-124

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Hensarling	X			Ms. Maxine Waters (CA)	X		
Mr. McHenry	X			Mrs. Carolyn B. Maloney (NY)	X		
Mr. King	X			Ms. Velázquez	X		
Mr. Royce (CA)	X			Mr. Sherman	X		
Mr. Lucas	X			Mr. Meeks	X		
Mr. Pearce	X			Mr. Capuano	X		
Mr. Posey	X			Mr. Clay	X		
Mr. Luetkemeyer	X			Mr. Lynch	X		
Mr. Huizenga	X			Mr. David Scott (GA)	X		
Mr. Duffy	X			Mr. Al Green (TX)	X		
Mr. Stivers	X			Mr. Cleaver	X		
Mr. Hultgren	X			Ms. Moore	X		
Mr. Ross	X			Mr. Ellison	X		
Mr. Pittenger	X			Mr. Perlmutter	X		
Mrs. Wagner	X			Mr. Himes	X		
Mr. Barr	X			Mr. Foster	X		
Mr. Rothfus	X			Mr. Kildee	X		
Mr. Messer	X			Mr. Delaney	X		
Mr. Tipton	X			Ms. Sinema	X		
Mr. Williams	X			Mrs. Beatty	X		
Mr. Poliquin	X			Mr. Heck	X		
Mrs. Love	X			Mr. Vargas	X		
Mr. Hill	X			Mr. Gottheimer	X		
Mr. Emmer	X			Mr. Gonzalez (TX)	X		
Mr. Zeldin	X			Mr. Crist	X		
Mr. Trott	X			Mr. Kihuen	X		
Mr. Loudermilk	X						
Mr. Mooney (WV)	X						
Mr. MacArthur	X						
Mr. Davidson	X						
Mr. Budd	X						
Mr. Kustoff (TN)	X						
Ms. Tenney	X						
Mr. Hollingsworth	X						

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the findings and recommendations of the Committee based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee states that H.R. 4529 will help facilitate capital raising efforts by small businesses by extending shelf registration statements to small reporting companies.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATES

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 16, 2018.

Hon. JEB HENSARLING,
*Chairman, Committee on Financial Services,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4529, the Accelerating Access to Capital Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Stephen Rabent.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 4529—Accelerating Access to Capital Act of 2017

Under current law, companies that sell securities must register their offerings with the Securities and Exchange Commission (SEC). Certain companies that meet various requirements may use a simplified registration form. H.R. 4529 would expand eligibility to use the simplified registration form.

Using information from the SEC, CBO estimates that implementing H.R. 4529 would cost less than \$500,000 over the 2018–2022 period for the agency to update its registration rules. How-

ever, the SEC is authorized to collect fees sufficient to offset its annual appropriation; therefore, CBO estimates that the net effect on discretionary spending would be negligible, assuming appropriation actions consistent with that authority.

Enacting H.R. 4529 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 4529 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 4529 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA).

If the SEC increases fees to offset the costs associated with implementing the bill, H.R. 4529 would increase the cost of an existing mandate on private entities required to pay those fees. Using information from the SEC, CBO estimates that the incremental cost of the mandate would fall well below the annual threshold for private-sector mandates established in UMRA (\$156 million in 2017, adjusted annually for inflation).

The CBO staff contact for this estimate is Stephen Rabent. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

This information is provided in accordance with section 423 of the Unfunded Mandates Reform Act of 1995.

The Committee has determined that the bill does not contain Federal mandates on the private sector. The Committee has determined that the bill does not impose a Federal intergovernmental mandate on State, local, or tribal governments.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of the section 102(b)(3) of the Congressional Accountability Act.

EARMARK IDENTIFICATION

With respect to clause 9 of rule XXI of the Rules of the House of Representatives, the Committee has carefully reviewed the provisions of the bill and states that the provisions of the bill do not contain any congressional earmarks, limited tax benefits, or limited tariff benefits within the meaning of the rule.

DUPLICATION OF FEDERAL PROGRAMS

In compliance with clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of the bill establishes or reauthorizes: (1) a program of the Federal Government known to be duplicative of another Federal program; (2) a program included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public

Law 111–139; or (3) a program related to a program identified in the most recent Catalog of Federal Domestic Assistance, published pursuant to the Federal Program Information Act (Pub. L. No. 95–220, as amended by Pub. L. No. 98–169).

DISCLOSURE OF DIRECTED RULEMAKING

Pursuant to section 3(i) of H. Res. 5, (115th Congress), the following statement is made concerning directed rulemakings: The Committee estimates that the bill requires one directed rulemaking to direct the SEC to revise Form S–3.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This section cites H.R. 4529 as the “Accelerating Access to Capital Act of 2017.”

Section 2. Expanded eligibility for use of Form S–3

This section directs the SEC to revise Form S–3 to permit securities to be registered if the primary securities offerings exceed one-third of the aggregate market value of voting and non-voting common equity held by non-affiliates of the registrant and to permit smaller reporting companies without a class of common equity securities listed and registered on a national securities exchange to register primary securities offerings up to one-third of their public float.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

H.R. 4529 does not repeal or amend any section of a statute. Therefore, the Office of Legislative Counsel did not prepare the report contemplated by clause 3(e)(1)(B) of rule XIII of the Rules of the House of Representatives.

MINORITY VIEWS

H.R. 4529 would dangerously expand the type of companies that are eligible to use the Securities and Exchange Commission's short-form registration statement (Form S-3) to register their securities before selling them to the general public. Current restrictions for companies using Form S-3, which are based on size and whether they are traded on an exchange, ensure that they have timely information available to the public, ample liquidity, and strong corporate governance standards. By removing these restrictions, H.R. 4529 would allow small, little-known companies to avoid SEC staff review and invite accounting fraud, market manipulation, insider trading, and sales of artificially inflated stock.

Unlike Form S-1, the SEC's general registration statement, Form S-3 is a streamlined form that allows eligible companies to sell their securities as they wish over the course of three years, without having to file and seek SEC approval for separate registration statements. These "shelf offerings" provide companies with considerable flexibility in how they sell their shares, allowing them to take advantage of changes in the markets and other factors.

In exchange for this flexibility, companies must meet certain restrictions designed to protect investors. In particular, companies must have consistently filed their public reporting forms for one year and either (1) have at least \$75 million in common equity or (2) be listed on an exchange and sell no more than one-third of the value of their common equity in a year.

According to the SEC, these restrictions ensure that the investing public has sufficient and timely information about these companies, making multiple registration statements unnecessary. For example, companies with more than \$75 million in common equity are more widely followed by research analysts, while exchange-traded companies with less than \$75 million must meet exchange listing standards that ensure liquidity and strong corporate governance standards.

H.R. 4529 ignores these common-sense restrictions and would allow non-exchange traded companies, regardless of size, to sell up to 1/3 of the value of their common equity using Form S-3. If a company is traded on an exchange, the bill would allow it to sell an unlimited number of shares using Form S-3, again regardless of size.

Democratic witnesses have testified before the Committee that such an expansion of Form S-3 would allow companies to avoid SEC staff review and risk increased fraud and market manipulation, particularly for non-exchange traded companies. According to Professor Mercer Bullard of the University of Mississippi School of Law, previous studies have found that 80% of manipulation cases involved non-exchange traded stocks, and a positive correlation between lower disclosure requirements and the likelihood of manipu-

lation. Professor John Coffee from the Columbia Law School also testified that such a change to Form S-3 “invites potential disaster and investor confusion.”

According to the Consumer Federation of America (CFA), “the most likely, and perhaps the best outcome, if this legislation is adopted, is that the market simply will not accept such offerings, and thus it will do nothing to promote capital formation.” The CFA has also noted that “this bill increases the risk of fraud and misconduct without offering any benefits to justify that added risk.”

For all of these reasons, we oppose H.R. 4529.

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