

House Bills Could Make IPOs And Private Offerings Easier

By Tom Zanki

Law360, New York (November 3, 2017, 8:45 PM EDT) -- The House of Representatives has passed a pair of bills aimed at making initial public offerings easier while also expanding the population eligible to invest in pre-IPO companies, moves that attorneys say could modestly benefit capital raising if they pass the Senate.

The first bill, the Encouraging Public Offerings Act of 2017, passed Wednesday on a 419-0 vote. It takes certain benefits created by the Jumpstart Our Business Startups Act that were originally targeted for smaller, "emerging growth" companies and applies them to all issuers.

The same day, the House passed by voice vote the Fair Investment Opportunities for Professionals Act. That bill widens the definition of an accredited investor so professionals such as licensed brokers or investment advisers can participate in private placements.

Both pieces of legislation tinker with existing frameworks rather than significantly alter policy.

Encouraging Public Offerings Act

This bill, sponsored by Ted Budd, R-N.C., and Gregory Meeks, D-N.Y., would allow all private companies to "test the waters" before an IPO, meaning they could communicate with accredited and institutional investors to gauge interest about a potential offering to obtain a better sense of whether they should move forward with plans.

Pre-IPO communications are normally tightly restricted under securities laws, though the JOBS Act in 2012 loosened the reins somewhat to encourage IPOs among so-called emerging growth companies, which are generally defined as companies with \$1.07 billion in revenue or less.

The act would also allow all companies to initially file their IPOs confidentially, basically codifying into law a practice the U.S. Securities and Exchange Commission instituted earlier this year. The JOBS Act originally limited the confidentiality benefit to EGCs while leaving the SEC discretion to broaden that policy to all issuers, which the agency did in June.

Confidential filing enables an issuer to file an IPO under wraps while the SEC reviews the submission, providing a company the flexibility to cancel plans without divulging sensitive information to competitors in case it decides not to proceed. Companies must eventually make IPO plans public at least

15 days before launching a marketing process known as a roadshow.

Capital markets attorneys said the legislation builds on momentum that started with the JOBS Act, noting that both the testing-the-waters and confidentially provisions have been widely used since adoption. The JOBS Act sought to stem a decline in IPOs during an era in which more companies are staying private longer, opting to raise capital privately while avoiding the cost and scrutiny of public markets.

"Expanding [those benefits] to all issuers will continue to simplify the capital-raising process, but I don't think that these changes alone will meaningfully impact the number of IPOs coming to market," Reed Smith LLP partner Danielle Carbone said.

Attorneys said the changes could give comfort to the so-called unicorns, a term for private companies valued at \$1 billion or more, that are considering going public because it would assure that they could file IPOs confidentially and "test the waters" without running afoul of the law.

Covington & Burling LLP partner Eric Blanchard noted that many larger unicorns like Uber Technologies Inc. wouldn't qualify as EGCs because their revenue exceeds the \$1.07 billion limit. While not a "game changer," Blanchard said the bill is helpful.

"I am sure people will take advantage of it if it is passed, and it will, for the larger companies, make the U.S. perhaps more attractive as an initial listing," Blanchard said.

Fair Investment Opportunities for Professionals Act

This bill would enable more people to invest in private placements under the SEC's Regulation D exemption.

Such eligibility is currently limited to "accredited investors," defined as individuals with \$200,000 in annual income, married couples making \$300,000, or individuals or couples with a joint net worth of \$1 million excluding their home value.

The legislation, sponsored by Rep. David Schweikert, R-Ariz., widens the criteria for defining an accredited investor beyond wealth and income to include a person's sophistication. If the bill becomes law, anyone licensed or registered as a broker or investment adviser by the SEC, Financial Industry Regulatory Authority, or equivalent self-regulatory organization could be considered an accredited investor.

The Schweikert bill would also broaden the accredited investor criteria to include individuals with professional knowledge related to a particular investment, assuming that person's education or job experience can be verified by FINRA or an equivalent authority.

Day Pitney LLP counsel Eliza Fromberg said including investment professionals as accredited investors makes sense, because those individuals are already making investment recommendations for others. But she added that deciding whether a person has the "professional knowledge" needed to invest in private securities would be a more subjective call.

"I think the 'professional knowledge' prong will be difficult to implement, since it requires correlating a person's experience to a particular investment, which requires a case-by-case determination," Fromberg

said. "This type of verification is time-consuming, and FINRA is not well suited to conduct this review."

Both bills now head to Senate Committee on Banking, Housing and Urban Affairs.

--Editing by Mark Lebetkin and Katherine Rautenberg.

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