

Prospects for Securities and Financial Legislation in the 113th Congress

Highlights

- ✓ The Banking Committee will revisit Dodd-Frank
- ✓ Chairman Hensarling can be expected to reintroduce a version of H.R. 1182 — The GSE Bailout Elimination and Taxpayer Protection Act in the 113th Congress
- ✓ There is strong bipartisan support for H.R. 1223 — The GSE Credit Risk Equitable Treatment Act
- ✓ There is growing bipartisan support for the creation of a U.S. covered bond market under SEC or FDIC supervision
- ✓ The PCAOB Enforcement Transparency Act (S. 1907) would make hearings by the PCAOB public unless otherwise ordered by the Board
- ✓ The issue of how best to regulate and examine SEC-registered investment advisers is almost certain to emerge in the 113th Congress
- ✓ The 113th Congress is almost certain to also tackle reform of the federal regulatory process

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There is growing bipartisan support to take up a Dodd-Frank corrections bill in the 113th Congress based on the common sense belief that a piece of legislation of the complexity and size of Dodd-Frank will have unintended consequences. In addition, the 113th Congress is likely to reform the government-sponsored entities, particularly Fannie Mae and Freddie Mac, as part of an effort to create a private market for mortgage-backed securities and other forms of securitized assets. In other areas, the next Congress is poised to address reform of the federal regulatory process along the lines of two seminal Executive Orders issued by President Obama during his first term.

Dodd-Frank Corrections Legislation

Recently, Senate Banking Committee member Mark Warner (D-VA) told the Bipartisan Policy Center that the 113th Congress should consider major Dodd-Frank Act corrections legislation. While Dodd-Frank broadly got things directionally right, said Senator Warner, there are lots of places in Dodd-Frank where Congress got it wrong. Historically, with any major piece of federal legislation, Congress never gets it entirely right the first time. The Banking Committee will revisit Dodd-Frank in a rational way, he promised.

Specifically, when Congress revisits Dodd-Frank, he noted, more work must be done on transparency, derivatives, and the Volcker Rule. He called for a more principles-based Volcker Rule that is not as rules-based. He also said that many of the problems arising around swaps are due to regulatory overlap. The reality is that regulators protect their own turf, he observed. Congress and the regulators must also recognize the diversity of U.S. financial institutions and not impose the same level of stringent regulations and capital standards on mid-size and smaller financial institutions that are applied to large global financial institutions.

Another concern is that the Financial Stability Oversight Council (FSOC) is an imperfect creation with no independent entity or person in charge. The FSOC has not become the arbiter of conflicting regulations that he envisioned it would be, nor has it played the role of adjudicator of conflicting regulations. Perhaps it is because the Office of Financial Research (OFR) created by Dodd-Frank has not functioned as a quasi-independent backstop to get data to the FSOC as he had hoped it would. There is still no permanent OFR Director.

There are also continuing issues around the FSOC designation of financial firms as systemically important, thereby subjecting them to stricter regulation. The Banking Committee knew that the designation process would be problematic, said Senator Warner.

He explained that Congress was confronted with two choices: (1) break up the largest financial institutions or put a cap on them (which Congress may revisit), or (2) designate systemically important financial institutions

for more stringent regulation. Congress rejected the first choice because of a global trend toward larger financial firms; and Congress did not see the size of U.S. firms as putting many of them in the global top 50. In addition, it would be difficult to impose and administer an arbitrary asset cap.

Congress decided to put a price on being large, in the form of higher capital standards, stricter leverage ratios, and convertible contingent capital. The capital standards component is working, he said, while the jury is out on contingent capital.

Any Dodd-Frank corrections legislation is highly likely to build on various pieces of legislation that received overwhelming bipartisan support in the 112th Congress. Below is a list of legislation passed by the House or favorably reported out of a House oversight committee.

- *H.R. 2827*: clarifying that Section 975 of Dodd-Frank requiring municipal advisors to register with the SEC does not include banks, investment advisers and members of municipal governing bodies. Passed House by voice vote.
- *H.R. 2779*: exempting inter-affiliate swaps from Dodd-Frank Act derivatives regulations. Passed House by vote of 357-36.
- *H.R. 2682*: Business Risk Mitigation and Price Stabilization Act, clarifying the exemption, under Dodd-Frank, for end-users hedging risk with derivatives. Passed House by vote of 370-24.
- *H.R. 3336*: Small Business Credit Availability Act, amending the Commodity Exchange Act to clarify that insured depository institutions will not be swap dealers under Dodd-Frank to the extent they enter into swaps with customers to manage risk in connection with the extension of credit. Passed House by vote of 312-111.
- *H.R. 2586*: Swap Execution Facility Clarification Act, clarifying that the SEC or CFTC cannot require a swap execution facility to have a minimum number of participants, receive or respond to quote requests or display quotes for time certain. Approved by voice vote by the House Financial Services Committee and Agriculture Committee.
- *H.R. 1838*: Swaps Bailout Prevention Act, repealing Section 716 of Dodd-Frank, the swap push out provision, which requires financial institutions to separate and segregate portions of their derivatives business. Approved by voice vote by the House Financial Services Committee.
- *H.R. 3527*: Protecting Main Street End Users from Excessive Regulation Act, revising definition of swap dealer to state that in determining if a person is a

swap dealer no consideration can be given to transactions entered into for the person's own account to hedge commercial risk. Approved by voice vote by House Agriculture Committee.

- *H.R. 4235*: Swap Data Repository and Clearinghouse Indemnification Correction Act, repealing the indemnification provisions in Sections 725, 728, and 763 of the Dodd-Frank Act to facilitate global regulatory cooperation and ensure that U.S. regulators have access to necessary swaps data from foreign data repositories, derivatives clearing organizations, and regulators. Approved by Financial Services Committee.
- *H.R. 1573*: exempting non-U.S. persons from the requirements of Title VII of Dodd-Frank if they are subject to comparable regulation under a regulatory regime in their home country, adequate information-sharing arrangements are in effect between the SEC and the CFTC and the non-U.S. regulator, and the exemption is consistent with the public interest. Approved by House Financial Services Committee and Agriculture Committee.

Reform of GSEs and Securitization

Representative Jeb Hensarling, Chair of the House Financial Services Committee for the 113th Congress, has been a strong advocate for the reform of government-sponsored enterprises (GSE) and the creation of a private secondary mortgage market in the U.S. and a revival of securitization. Chairman Hensarling can be expected to move legislation on these issues.

In the 112th Congress, Rep. Hensarling introduced legislation that would either place the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) into receivership or reform the GSEs under new regulations. Chairman Hensarling can be expected to reintroduce a version of this legislation in the 113th Congress and pass it out of the Committee to the House floor.

The GSE Bailout Elimination and Taxpayer Protection Act ([H.R. 1182](#)) would have set a finite end to the GSEs' conservatorship two years from the date of enactment and imposed a prohibition on any reduction to the senior preferred stock dividends the GSEs contractually agreed to pay taxpayers under their conservatorship. At the end of the conservatorship, the Federal Housing Finance Agency (FHFA) would evaluate the financial viability of each GSE. If it is determined not to be viable, the FHFA would follow the procedure laid out by the Housing and Economic Recovery Act of 2008 ([P.L. 110-289](#)) for placing that GSE into receivership.

If determined to be viable, the GSE would be allowed to resume limited market operations under its own control for a maximum of three years under new regulations that would enhance the authority for the FHFA to adjust the minimum capital requirements for the GSEs as appropriate, mirroring the existing capital adequacy requirements other regulators already have in place for banks. The legislation would also repeal the exemption allowing GSE securities to avoid full SEC registration.

Rep. Hensarling also sponsored the GSE Portfolio Risk Reduction Act (H.R. [1224](#)), which would have prohibited Fannie Mae and Freddie Mac from owning mortgage assets in excess of: (1) \$700 billion one year after enactment of the Act; (2) \$600 billion two years after enactment; (3) \$475 billion three years after enactment; (4) \$350 billion four years after enactment; and (5) \$250 billion five years after enactment. H.R. [1224](#) was approved by the House Capital Markets Subcommittee by a vote of 20-14.

Rep. Hensarling co-sponsored the GSE Credit Risk Equitable Treatment Act (H.R. [1223](#)), which would have amended the Securities Exchange Act to require that credit risk retention regulations ensure that there is no difference in the treatment of asset-backed securities securitized by Fannie Mae or Freddie Mac solely because of securitization by the GSE from the treatment of other asset-backed securities securitized by any other entity. There is strong bipartisan support for this legislation as evidenced by its approval by the Capital Markets Subcommittee by a 34-0 vote.

An effort to include GSE reform in the Dodd-Frank Act failed as House and Senate managers of Dodd-Frank decided to do GSE reform in separate legislation. The McCain-Shelby-Gregg GSE amendment, which was not adopted, would have provided transparency to the conservatorships of the GSEs by establishing much needed investigative oversight. It would also have required Fannie Mae and Freddie Mac to be included in the federal budget as long as they are in conservatorship or receivership status.

In the 113th Congress, it may well be time to do that separate piece of GSE reform legislation that the Dodd-Frank Act reserved for a later Congress.

Covered Bond Act

A securitization device widely used in other countries is the covered bond — a debt obligation issued by a financial institution and secured by a pool of high-quality mortgages or other assets. As part of GSE reform, and as a replacement for the mortgage securitization function

that GSEs currently perform, there is a growing bipartisan effort to pass legislation creating a U.S. covered bond market under SEC or FDIC supervision.

In the 112th Congress, the United States Covered Bond Act (H.R. [940](#)) advanced in the House with overwhelming bipartisan support and a Senate companion bill, S. [1835](#), was introduced by Senator Kay Hagan (D-NC) with key bipartisan support. The House legislation was introduced by Rep. Carolyn Maloney (D-NY) and Rep. Scott Garrett (R-NJ), Chair of the Capital Markets Subcommittee. Rep. Garrett will continue to Chair the Capital Markets Subcommittee in the 113th Congress. At a hearing before the Senate Banking Committee, Treasury Secretary Tim Geithner said that the Obama Administration backs efforts to create a market for covered bonds for financing mortgages that would help wean the mortgage market from government support.

While covered bonds are a securitization device widely used in other countries, they have failed to catch on in the United States. Covered bonds are an innovative source of private mortgage market financing which has worked well in many European countries. For example, covered bonds are the primary source of mortgage funding for European banks. Indeed, covered bonds have been used in Europe for decades to help provide additional funding options for the issuing institutions and are a major source of liquidity for many European nations' mortgage markets. These instruments are subject to extensive statutory and supervisory regulation designed to protect the interests of covered bond investors from the risks of insolvency of the issuing bank.

Covered bonds also help to resolve some of the difficulties associated with the originate-to-distribute model. The on-balance-sheet nature of covered bonds means that the issuing banks are exposed to the credit quality of the underlying assets, a feature that better aligns the incentives of investors and mortgage lenders than does the originate-to-distribute model of mortgage securitization. The cover pool assets are typically actively managed, thereby ensuring that high-quality assets are in the cover pool at all times and providing a mechanism for loan modifications and workouts. Also, the structure used for such bonds tends to be fairly simple and transparent.

They are also a private market solution to the need for market participants to have “skin in the game.” A covered bond is a form of debt issued by a financial institution where a specific set of high quality assets, typically loans, are set aside into a pool for the benefit of the bondholders. The issuers of covered bonds are responsible to their bondholders for the risk posed by the underlying loan pool. For example, if the underlying

ing loans default, bondholders can make claims against the issuer. If the issuer becomes insolvent, bondholders retain full claim on the loan pool. Additionally, issuers of covered bonds are required to account for the risk posed by their bonds on their balance sheets.

Legislation typically specifies the types of collateral permitted in the cover pool, defines a minimum over-collateralization level, provides certainty of principal and interest payments to investors in the case of insolvency, and requires disclosures to regulators or investors or both. In addition, the government generally provides strong assurances to investors by having bank supervisors ensure that the cover pool assets that back the bonds are of high quality and that the cover pool is well managed.

Currently, the U.S. does not have the extensive statutory and supervisory regulation designed to protect the interests of covered bond investors that exists in European countries. The purpose of the United States Covered Bond Act (H.R. 940) is to create a legislative framework for U.S. covered bonds, which are securities issued by banks and backed by pools of loans that enable credit to flow more readily from the capital markets to individuals and small businesses in a way that enhances stability of the broader financial system. The core elements of the legislative framework are legal certainty for covered bond programs and oversight by federal regulators.

Any covered bond issued or guaranteed by a bank will be treated as a security issued or guaranteed by a bank under Section 3(a)(2) of the Securities Act and Section 3(c)(3) of the Investment Company Act, as well as Section 304(a)(4)(A) of the Trust Indenture Act. No covered bond issued or guaranteed by a bank will be treated as an asset-backed security as defined in Section 3 of the Securities and Exchange Act.

Thus, any estate created must be exempt from all securities laws, but must be subject to the reporting requirements established by the applicable covered bond regulator and must succeed to any requirement of the issuer to file periodic information, documents, and reports in respect of the covered bonds as specified in Section 13(a) of the Securities Exchange Act or rules established by an appropriate federal banking agency. Similarly, any residual interest in an estate that is or may be created must be exempt from all securities laws.

PCAOB

Another piece of legislation that appears to have strong bipartisan support would reform PCAOB procedures. The PCAOB has asked Congress for legislation amending the Sarbanes-Oxley Act so that Board disciplinary

hearings against individual auditors and accounting firms will be public. From the initiation of the PCAOB disciplinary proceeding through the SEC decision to let the sanctions commence, the entire proceeding currently takes place behind closed doors, which is in sharp contrast to similar SEC proceedings against auditors.

In the 112th Congress, Senators Jack Reed (D-RI) and Charles Grassley (R-Iowa) introduced legislation making PCAOB disciplinary proceedings public to bring auditing deficiencies at the audit firms or the companies they audit to light in a timely manner and help deter violations. The PCAOB Enforcement Transparency Act, S. 1907, would make hearings by the PCAOB, and all related notices, orders, and motions, open and available to the public unless otherwise ordered by the Board. The Board procedure would then be similar to the SEC's Rules of Practice for similar matters, where hearings and related notices, orders, and motions are open and available to the public. The draft legislation would also retain the Board's flexibility to order non-public proceedings in appropriate cases.

It is expected that this legislation will be re-introduced in the 113th Congress. Senators Reed and Grassley will have key oversight roles in the 113th Congress and the PCAOB continues to support the legislation.

The PCAOB is responsible for setting auditing standards for auditors of public companies, for examining the quality of audits performed by public company auditors and, where necessary, for imposing disciplinary sanctions on registered auditors and auditing firms. The Board's ability to commence proceedings to determine whether there have been violations of its auditing standards or rules of professional practice is an important component of its oversight.

In order to determine whether to institute a proceeding, the Board's enforcement staff conducts a nonpublic investigation and makes a recommendation to the five-member Board. However, unlike other oversight bodies, such as the SEC and the CFTC, the Board's disciplinary proceedings are not allowed to be public.

Unfortunately, noted Senator Reed, over the last several years, bad actors have been taking advantage of this lack of transparency. In April 2011, the Senate Securities Subcommittee, which he chairs, considered the issue of enhancing the PCAOB's effectiveness by permitting the Board to disclose information about its enforcement proceedings. PCAOB Chair James Doty noted that the secrecy has a variety of unfortunate consequences and this state of affairs is not good for investors, for the auditing profession, or for the public at large. (Cong. Record, Nov. 18, 2011, pp. S7831-7832.)

In one example cited by Senator Reed, an accounting firm that was subject to a disciplinary proceeding continued to issue no fewer than 29 additional audit reports on public companies without any of those companies knowing about the PCAOB proceedings. Those public companies and their investors were completely in the dark about the board's decision to both institute disciplinary proceedings and about the progress of those proceedings. The auditor knew about the proceedings, but the investors and public companies were denied information that was arguably very relevant to the audit relationship. (Cong. Record, Nov. 18, 2011, pp. S7831-7832.)

Senator Reed noted three additional reasons that the proceedings should be open and transparent. First, the closed proceedings run counter to the public proceedings of other oversight bodies. Nearly all administrative proceedings brought by the SEC against public companies, brokers, dealers, investment advisers, and others are open, public proceedings. (Cong. Record, Nov. 18, 2011, pp. S7831-7832.)

Second, the incentive to litigate cases in order to continue to shield conduct from the public as long as possible frustrates the process and requires the expenditure of needless resources by both litigants and the PCAOB. Third, a recent academic study noted that the public nature of SEC proceedings against companies creates good results. The study observed that a public SEC enforcement action in its industry against a target firm is likely to increase a peer firm's knowledge about SEC activity and cause it to revise upward its subjective probability of attracting such an action against itself. In effect, the study noted that this may serve as a deterrent to misconduct because of a perceived increase in getting caught. Accordingly, the audit industry would also benefit from timely, public, and non-secret enforcement proceedings.

Regulation of Investment Advisers

The issue of how best to regulate and examine SEC-registered investment advisers is almost certain to emerge in the 113th Congress, which will continue to address a situation in which there is a broad consensus on the need for enhanced oversight and inspection of investment advisers.

Section 914 of the Dodd-Frank Act mandated an SEC staff study, which resulted in the SEC offering Congress three options: (1) authorize the SEC to impose user fees on SEC-registered investment advisers to fund their examinations by the SEC's Office of Compliance Inspections and Examinations; (2) authorize one or

more SROs to examine, subject to SEC oversight, all SEC-registered investment advisers; or (3) authorize FINRA to examine dual registrants for compliance with the Investment Advisers Act. In the view of Financial Services Committee Chairman Spencer Bachus (R-AL), of the three, an SRO for investment advisers would be the most comprehensive and streamlined approach to address the regulatory weakness.

To that end, Chairman Bachus and Rep. Carolyn McCarthy (D-NY) co-sponsored bipartisan legislation, the Investment Advisers Oversight Act (H.R. [4624](#)) to establish an SRO for investment advisers. Noting that SEC-registered investment advisers are generally inspected once every decade, Chairman Bachus said that investor protection requires more timely oversight of investment advisers. He noted that H.R. [4624](#) closes a glaring regulatory gap that undermines investor confidence. One of the tenets of the Dodd-Frank Act is that the inadequate oversight of investment advisers is a weakness of the current financial regulatory system, he noted.

The proposed legislation garnered some industry support. FINRA CEO Ketchum supports H.R. [4624](#) as a direct, bipartisan response to the SEC's study and recommendations and an important and thoughtful effort to help fill the gap in the protection of investment advisory clients. Specifically, the legislation addresses the current lack of SEC resources by allowing self-regulatory organizations registered with and subject to strict SEC oversight to assist government regulators in providing closer and more regular oversight of investment advisers who serve predominantly retail investors.

The securities industry also supports the legislation. SIFMA took the position that H.R. [4624](#) would result in enhanced oversight of retail investment advisers and thereby better serve and protect individual clients. The legislation would not foist new regulatory oversight on retail investment advisers, but rather would restore the oversight that is already supposed to be happening but is not, while relieving pressure on the limited examination resources of the SEC.

Meanwhile, an alternative to an SRO for investment advisers began to take shape around a legislative proposal from Rep. Maxine Waters (D-CA), who is the Ranking Member on the Financial Services Committee in the 113th Congress, replacing the retiring Rep. Barney Frank (D-MA). On the issue of how best to regulate and inspect SEC-registered investment advisers, Rep. Waters opposes the creation of an SRO for investment advisers, in favor of raising fees on advisers to pay for more SEC inspections.

Rep. Waters introduced the Investment Adviser Examination Improvement Act, H.R. [6204](#), which provides a dedicated funding source to the SEC to pay for a robust investment adviser oversight program, consistent with a recommendation in the SEC staff paper required under Section 914 of the Dodd-Frank Act. Rep. Waters called H.R. [6204](#) the approach that provides the simplest, most efficient solution to the problem of inadequate oversight of investment advisers.

The bill would direct the SEC to collect an annual fee from registered investment advisers to defray the cost of SEC inspections and examinations. The bill would exempt state-regulated investment advisers from the requirement to pay an annual fee.

The legislation prescribes a fee calculation formula and requires the SEC to make the formula publicly available on its website along with the factors used to reach the fee determination. The Comptroller General would have to audit biennially the use of such fees, SEC reviews of the fee formula, and any adjustments to it.

The Investment Advisers Oversight Act, H.R. [4624](#), did not advance beyond the hearings stage in the 112th Congress. But the imperative to act on one of the SEC's legislative recommendations for enhanced investment adviser oversight will also exist in the 113th Congress, which can be expected to take up the issue.

Family Office

Rep. Hensarling introduced a bill in the 112th Congress (H.R. [2225](#)) to amend the Investment Advisers Act to define “family office” (exempt from coverage by the Act) as a company (including any director, partner, trustee, or employee of such company, when acting in their respective capacities as such) that has no clients other than family clients and is owned, controlled, or operated primarily for the benefit of family clients and does not hold itself out to the public as an investment adviser.

Reform of the Federal Regulatory Process

The 113th Congress is almost certain to also tackle the reform of the federal regulatory process. One vehicle could be the bipartisan Independent Regulatory Analysis Act, S. [3468](#), which garnered key bipartisan support in the 112th Congress. Introduced by Senator Mark Warner (D-VA, with Senators Rob Portman (R-OH) and Susan Collins (R-ME), S. [3468](#) would have required independent federal agencies, such as the SEC and CFTC, to

conduct a cost-benefit analysis of new regulations and tailor new regulations to minimize unnecessary burdens on the economy.

The bill would also have provided for review by the Office of Information and Regulatory Affairs (OIRA) of every proposed and final economically significant regulation, pegged at economic impact of \$100 million or more, followed by a public exchange of views between OIRA and the independent agency concerning the quality of the agency's cost-benefit analysis. Although OIRA would not have the power to reject a regulation, it would place its evaluation of the agency's cost-benefit analysis in the public record.

The idea that there should be a cost-benefit analysis of a regulation at a threshold of \$100 million is supported by heads of OIRA in both Democratic and Republican Administrations. Recently, a bipartisan group of former OIRA administrators from the Clinton, Reagan and both Bush administrations sent a letter to Senator Joseph Lieberman (I-CT), Chair of the Homeland Security and Government Affairs Committee, which was considering the legislation, expressing their strong support for the bill.

The former OIRA chiefs noted that for thirty years presidents of both parties have required executive agencies to consider regulatory impact, including a cost-benefit analysis, when crafting new regulations, with review by OIRA. These requirements have not been imposed on independent federal agencies, and the OIRA heads fear that independent agencies have typically not engaged in the economic analysis that has come to be expected from executive agencies. These agencies are independent not because their method of regulation differs from executive agencies, noted the former OIRA Administrators, but rather because Congress has limited the power of the President to remove their top officials, either by statute or tradition.

With regard to a cost-benefit analysis of federal regulations, Senator Warner told the Bipartisan Policy Center that the notion that there should be a distinction between independent federal agencies like the SEC and CFTC and executive agencies does not pass muster. Senator Warner added that he does not trust most cost-benefit analyses of federal regulations currently being done by either the federal agencies or the industry. Further, he noted that there is currently no independent retrospective review of the federal regulatory structure. There should be a look-back mechanism of three to five years to ascertain if the regulation is accomplishing its goal. The Senator said he wants regulatory effectiveness, not a regulatory moratorium.

President Obama has been a strong champion of reform of the federal regulatory process. This was evidenced by two Executive Orders issued during his first term: Executive Order No. [13563](#), 76 Fed. Reg. 3,821 (Jan. 21, 2011) and Executive Order No. [13579](#), 76 Fed. Reg. 41,587 (July 14, 2011).

EO No. [13563](#) set out general requirements directed to executive agencies concerning public participation, integration and innovation, flexible approaches, and science. It also reaffirmed that executive agencies should conduct a cost-benefit analysis of regulations. EO No. [13579](#) states that independent regulatory agencies should follow EO No. [13563](#). To facilitate the periodic review of existing significant regulations, EO No. [13579](#) said that independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.

There is a debate over whether EO No. [13579](#) directed independent regulatory agencies to conduct a cost-benefit analysis of regulations. The use of the word “should” in the Executive Order has led some to conclude that it is not mandatory. This fuels the need for federal legislation to codify that independent regulatory agencies must conduct a cost-benefit analysis of regulations. Given the President’s issuance of these two Executive Orders and his commitment to regulatory reform, it is likely that the Administration will support some form of legislation similar to S. [3468](#) in the 113th Congress.

Legislation introduced in the House in the 112th Congress would have codified and applied to the SEC the Executive Order on agency rulemaking issued by President Obama. Sponsored by Rep. Scott Garrett (R-NJ), Chair of the Subcommittee on Capital Markets, the SEC Regulatory Accountability Act (H.R. [2308](#)), with 15 original co-sponsors, would have required the SEC to abide by President Obama’s Executive Order that government agencies conduct robust cost-benefit analysis to ensure that the benefits of any rulemaking outweigh the costs, and that both new and existing regulations are accessible, consistent, written in plain language, and easy to understand. The Financial Services Committee reported out H.R. [2308](#) to the full House by a vote of 30-26. Chairman Hensarling, who co-sponsored the bill, is also a proponent of reforming the federal regulatory process.

H.R. [2308](#) would have amended the Securities Exchange Act to direct the SEC, before issuing a regulation, to: (1) identify and evaluate the significance

of the problem that the proposed regulation is designed to address in order to assess whether any new regulation is warranted; (2) use the SEC Chief Economist to assess the costs and benefits of the intended regulation and adopt it only upon a reasoned determination that its benefits justify the costs; (3) identify and assess available alternatives that were considered; and (4) ensure that any regulation is accessible, consistent, written in plain language, and easy to understand.

The legislation would also have required the SEC to: (1) consider whether the rulemaking will promote efficiency, competition, and capital formation; (2) consider the impact of the regulation upon investor choice, market liquidity and small business; (3) explain in its final rule the nature of comments received concerning the proposed rule or rule change; and (4) respond to those comments, explaining any changes made in response, and the reasons that it did not incorporate industry group concerns regarding potential costs or benefits.

The bill would have further directed the SEC to: (1) review its regulations and orders periodically to determine if they are outmoded, ineffective, insufficient, or excessively burdensome; and (2) modify, streamline, expand, or repeal them.

A similar bill was introduced last year in the Senate by Sen. Richard Shelby (R-AL), Ranking Member on the Banking Committee. The Financial Regulatory Responsibility Act (S. [1615](#)) would have required the SEC and CFTC to provide clear justification for the regulations and determine the economic impacts of proposed rulemakings, including their effects on growth and net job creation. In addition, the legislation mandates that if a regulation’s costs outweigh its benefits, regulators are barred from promulgating it. ■

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