

STREAMLINING COMMUNICATIONS FOR INVESTORS ACT

NOVEMBER 2, 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. 6035]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 6035) to direct the Securities and Exchange Commission to revise section 230.163 of title 17, Code of Federal Regulations, to apply the exemption offered in such section to communications made by underwriters and dealers acting by or on behalf of a well-known seasoned issuer, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE AND SUMMARY

On June 7, 2018, Representative Ted Budd introduced H.R. 6035, the “Streamlining Communications for Investors Act”. H.R. 6035 directs the U.S. Securities and Exchange Commission (SEC) to revise SEC Rule 163(c) to allow a well-known seasoned issuer (WKSI) to authorize an underwriter or dealer to act as its agent or representative in communicating about offerings of the issuer’s securities prior to the filing of a registration statement. The legislation allows a WKSI to rely on the exemption provided in Rule 163 if, before such a communication is made, the underwriter or dealer making such communication receives written authorization from the WKSI to act as its agent or representative and the WKSI authorized or approved such communication. Additionally, a WKSI must identify, in the prospectus filed for an offering, each under-

writer or dealer that has made oral or written communications related to the offering in reliance on the exemption.

BACKGROUND AND NEED FOR LEGISLATION

The goal of H.R. 6035 is to enhance the efficiency of the U.S. capital markets by removing unnecessary regulatory impediments that inhibit a WKSI's ability to reach a broader group of prospective investors.

The SEC's 2005 Securities Offering Reform adopted various modifications to the registration, communication, and offering processes under the Securities Act of 1933, including creating a new category of issuer, the WKSI. WSIs benefit from the communications and registration flexibilities provided in the Securities Offering Reform and can register their offerings on shelf registration statements that become effective automatically upon filing, which means they are not required to wait until the SEC reviews and declares its statement effective before making sales.

Rule 163 of the SEC's 2005 Securities Offering Reform eased many of the "gun jumping" restrictions on communications by issuers and others in connection with securities offerings. Although Rule 163 permits a WKSI to offer securities before filing a registration statement, as currently drafted, Rule 163 only applies to communications made by the issuer itself. This means that other participants involved in the offering, such as underwriters or dealers, may not rely on this exception.

In 2009, the SEC proposed amending Rule 163 to allow underwriters or dealers to engage in offers or communications on behalf of WSIs. But in the wake of the financial crisis and the various directed rulemaking mandates in the Dodd-Frank Wall Street Reform and Consumer Protection Act, the SEC ultimately never finalized its 2009 proposal. In a comment letter to the SEC on its 2009 proposal Wilson, Sonsini, Goodrich & Rosati commented on January 27, 2010 that the WKSI proposal ". . . will remove an unnecessary barrier to communication and allow WSIs and their advisers to make better decisions concerning their ability to access the capitalmarkets, without impairing investor protection. In addition, investors will benefit from the Proposed Amendments through the efficiencies of direct communication with financial advisers to WSIs."

Similar to what the 2009 proposal envisioned, this legislation would amend Rule 163 to allow underwriters and dealers to act as agents on behalf of WSIs in making efforts in advance of the filing of the registration statement based on three conditions: (1) the underwriter or dealer making such communication receives written authorization from the WKSI to act as its agent or representative; (2) the WKSI must authorize or approve such communications; and (3) WSIs are required to identify in the prospectus any underwriter or dealer that made communications related to the offering in reliance on the exemption under Rule 163. The Center for Capital Markets Competitiveness at the U.S. Chamber of Commerce told the Subcommittee on Capital Markets, Securities and Investment on May 23, 2018, "Allowing WSIs to authorize an underwriter or dealer to communicate about offerings of the issuer's securities prior to the filing of a registration statement would help these companies better gauge investor interest before having to ex-

pand the time and resources to file a formal registration statement.”

Brett Paschke, Managing Director, Head of Capital Markets, William Blair, shared similar support for the legislation, “We also support many of the draft bills that have been released alongside this hearing. Some of these proposals . . . —such as allowing underwriters to communicate with prospective investors on behalf of well-known seasoned issuers (WKSIs)—are examples of thoughtful updates to our securities laws that will help those laws keep pace with the intense changes our public markets have undergone.”

The Committee agrees with the comments of Cravath, Swaine & Moore’s comment letter to the SEC from 2010 in support of the WKSI proposal, “. . . the Commission’s proposed amendments to Rule 163 are a welcome and practical extension of the existing rule that would further facilitate capital formation for WKSIs by allowing underwriters and dealers to gauge broader market interest in the issuer’s securities prior to filing a registration statement” H.R. 6130 simply codifies a proposal that would promote capital formation and in the SEC’s absence, Congress has the obligation to amend the law and provide more opportunities to issuers to reach more investors.

HEARINGS

The Committee on Financial Services held a hearing examining matters relating to H.R. 6035 on May 23, 2018.

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on June 14, 2018, and ordered H.R. 6035 to be reported favorably to the House without amendment by a recorded vote of 31 yeas to 23 nays (recorded vote no. FC–189), 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 31 yeas to 23 nays (Record vote no. FC–189), a quorum being present.

Record vote no. FC-189

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Hensarling	X			Ms. Maxine Waters (CA)		X	
Mr. McHenry				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			
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				Mr. Delaney		X	
Mr. Tipton	X			Ms. Sinema		X	
Mr. Williams	X			Mrs. Beatty			
Mr. Poliquin	X			Mr. Heck			
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				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. 6035 will make U.S. capital markets more efficient by reducing compliance costs and helping companies better gauge investor interest and market conditions by allowing WKSIs to authorize an underwriter or dealer to communicate about offerings prior to the filing of a registration statement so long as certain conditions are met.

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, September 20, 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. 6035, the Streamlining Communications for Investors Act.

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. 6035—Streamlining Communications for Investors Act

Under current law, companies that sell securities must register their offerings with the Securities and Exchange Commission (SEC) before communicating with investors about those securities. Some public companies, called well-known seasoned issuers (WKSI), are exempt from this communication limitation if they meet specific information disclosure conditions. H.R. 6035 would expand that exemption to include communication by an underwriter or dealer acting by or on behalf of a WKSI if the WKSI provides them written authorization to act as its agent, authorizes the communication, and identifies each underwriter or dealer that made use of the exemption in the prospectus for the offering.

Using information from the SEC, CBO estimates that implementing H.R. 6035 would cost less than \$500,000 for the agency to conduct a rulemaking to expand the current exemption. However, 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. 6035 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 6035 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

H.R. 6035 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA).

If the SEC increased fees to offset its costs to conduct a rulemaking, H.R. 6035 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 be small and fall well below the annual threshold for private-sector mandates established in UMRA (\$160 million in 2018, adjusted annually for inflation).

The CBO staff contacts for this estimate are Stephen Rabent (for federal costs) and Rachel Austin (for mandates). The estimate was reviewed 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 rule makings: The Committee estimates that the bill requires one directed rulemaking within the meaning of such section to direct the SEC to revise section 230.163(c) of title 17, Code of Federal Regulations, to allow underwriters and dealers to act as agents on behalf of WKSIs in making efforts in advance of the filing of the registration statement.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This section cites H.R. 6035 as the “Streamlining Communications for Investors Act”.

Section 2. Exemption of communications made by underwriters and dealers acting by or on behalf of well-known seasoned issuer

This section requires the SEC to amend Rule 163 to allow underwriters and dealers to act as agents on behalf of WKSIs in making efforts in advance of the filing of the registration statement based on three conditions: (1) the underwriter or dealer making such communication receives written authorization from the WKSI to act as its agent or representative; (2) the WKSI must authorize or approve such communications; and (3) WKSIs are required to identify in the prospectus any underwriter or dealer that made communications related to the offering in reliance on the exemption under Rule 163.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

H.R. 6035 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 House of Representatives.

MINORITY VIEWS

H.R. 6035, the so-called “Streamlining Communications for Investors Act,” would undermine the ability of investors to make informed decisions by towing underwriters and securities dealers acting on behalf of well-known seasoned issuers (“WKSIs”)¹ to offer securities prior to registering them with the Securities and Exchange Commission (“SEC”).

The SEC has already granted WKSIs substantial accommodations from our federal securities laws, including affording them the ability to quickly raise capital through automatic “shelf” registration. Shelf registration provides WKSIs the flexibility to register securities for sale to investors without waiting for SEC review and approval of the registration statement. Additionally, under SEC Rule 163, WKSIs enjoy the benefit of an SEC-created safe harbor from Section 5(c) of the Securities Act of 1933, which prohibits all offers of sale in any form prior to the filing of a registration statement.

H.R. 6035 would extend the Rule 163 safe harbor to underwriters and dealers acting on behalf of WKSIs. The bill would broadly apply to pre-registration offers for all types of securities. In 2009, the SEC proposed, but never finalized, a similar amendment to Rule 163. In a comment letter to the SEC’s 2009 proposal, the Credit Roundtable, a group of approximately 65 large fixed income institutional asset managers representing over \$2 trillion in fixed income assets under management, pointed out the unintended consequences such a change would impose on our markets. According to the Credit Roundtable, expanding Rule 163 to underwriters and dealers would, “exacerbate existing weaknesses in the fixed income offering process in which institutional investors are often in the position of having to make an investment decision within minutes of learning of an offering without ready access to key disclosure documents.” The Credit Roundtable recently reiterated this position in a letter to the Committee on Financial Services regarding H.R. 6035, adding that further compressing the time investors have to evaluate the merits of new debt offerings could introduce pricing inefficiencies and create inequities between investors.

Democratic witnesses during a May 2018 Capital Markets subcommittee hearing also expressed concerns with H.R. 6035. Specifically, Tyler Gellasch, Executive Director of Healthy Markets Association testified that regulatory accommodations afforded to WKSIs have compounded the uneven playing field between large corporations and smaller companies seeking to access the public markets and have thus contributed to the decline in initial public offerings.

¹ WKSIs are large corporations that are widely followed by analysts. To qualify as a WKSI, a public company must have a minimum capitalization of \$700 million, have been public for at least a year, and must not be an “ineligible issuer” by, for example, violating the securities laws.

In light of the existing accommodations available to WKSIs, H.R. 6035 appears to be unwarranted. Moreover, the bill would increase risks to investors by potentially undermining their ability to make informed investment decisions. For these reasons, we oppose H.R. 6035.

MAXINE WATERS.
CAROLYN B. MALONEY.
WM. LACY CLAY.
DANIEL T. KILDEE.
MICHAEL E. CAPUANO.

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