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HOUSE OF REPRESENTATIVES
REPORT
115–102

FAIR ACCESS TO INVESTMENT RESEARCH ACT OF 2017

MAY 1, 2017.—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

[To accompany H.R. 910]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 910) to direct the Securities and Exchange Commission to provide a safe harbor related to certain investment fund research reports, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair Access to Investment Research Act of 2017".

SEC. 2. SAFE HARBOR FOR INVESTMENT FUND RESEARCH.

(a) EXPANSION OF THE SAFE HARBOR.—Not later than the end of the 180-day period beginning on the date of enactment of this Act, the Securities and Exchange Commission shall propose, and not later than the end of the 270-day period beginning on such date, the Commission shall adopt, upon such terms, conditions, or requirements as the Commission may determine necessary or appropriate in the public interest, for the protection of investors, and for the promotion of capital formation, revisions to section 230.139 of title 17, Code of Federal Regulations, to provide that a covered investment fund research report that is published or distributed by a broker or dealer—

(1) shall be deemed, for purposes of sections 2(a)(10) and 5(c) of the Securities Act of 1933 (15 U.S.C. 77b(a)(10), 77e(c)), not to constitute an offer for sale or an offer to sell a security that is the subject of an offering pursuant to a registration statement that is effective, even if the broker or dealer is participating or will participate in the registered offering of the covered investment fund's securities; and

(2) shall be deemed to satisfy the conditions of subsection (a)(1) or (a)(2) of section 230.139 of title 17, Code of Federal Regulations, or any successor provisions, for purposes of the Commission's rules and regulations under the Federal securities laws and the rules of any self-regulatory organization.

(b) IMPLEMENTATION OF SAFE HARBOR.—In implementing the safe harbor pursuant to subsection (a), the Commission shall—

(1) not, in the case of a covered investment fund with a class of securities in substantially continuous distribution, condition the safe harbor on whether the broker's or dealer's publication or distribution of a covered investment fund research report constitutes such broker's or dealer's initiation or reinitiation of research coverage on such covered investment fund or its securities;

(2) not—

(A) require the covered investment fund to have been registered as an investment company under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) or subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)) for any period exceeding the period of time referenced under paragraph (a)(1)(i)(A)(1) of section 230.139 of title 17, Code of Federal Regulations; or

(B) impose a minimum float provision exceeding that referenced in paragraph (a)(1)(i)(A)(1)(i) of section 230.139 of title 17, Code of Federal Regulations;

(3) provide that a self-regulatory organization may not maintain or enforce any rule that would—

(A) prohibit the ability of a member to publish or distribute a covered investment fund research report solely because the member is also participating in a registered offering or other distribution of any securities of such covered investment fund; or

(B) prohibit the ability of a member to participate in a registered offering or other distribution of securities of a covered investment fund solely because the member has published or distributed a covered investment fund research report about such covered investment fund or its securities; and

(4) provide that a covered investment fund research report shall not be subject to section 24(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–24(b)) or the rules and regulations thereunder, except that such report may still be subject to such section and the rules and regulations thereunder to the extent that it is otherwise not subject to the content standards in the rules of any self-regulatory organization related to research reports, including those contained in the rules governing communications with the public regarding investment companies or substantially similar standards.

(c) RULES OF CONSTRUCTION.—Nothing in this Act shall be construed as in any way limiting—

(1) the applicability of the antifraud or antimanipulation provisions of the Federal securities laws and rules adopted thereunder to a covered investment fund research report, including section 17 of the Securities Act of 1933 (15 U.S.C. 77q), section 34(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–33), and sections 9 and 10 of the Securities Exchange Act of 1934 (15 U.S.C. 78i, 78j); or

(2) the authority of any self-regulatory organization to examine or supervise a member's practices in connection with such member's publication or distribution of a covered investment fund research report for compliance with applicable provisions of the Federal securities laws or self-regulatory organization rules related to research reports, including those contained in rules governing communications with the public, or to require the filing of communications with the public the purpose of which is not to provide research and analysis of covered investment funds.

(d) INTERIM EFFECTIVENESS OF SAFE HARBOR.—

(1) IN GENERAL.—From and after the 270-day period beginning on the date of enactment of this Act, if the Commission has not adopted revisions to section 230.139 of title 17, Code of Federal Regulations, as required by subsection (a), and until such time as the Commission has done so, a broker or dealer distributing or publishing a covered investment fund research report after such date shall be able to rely on the provisions of section 230.139 of title 17, Code of Federal Regulations, and the broker or dealer's publication of such report shall be deemed to satisfy the conditions of subsection (a)(1) or (a)(2) of section 230.139 of title 17, Code of Federal Regulations, if the covered investment fund that is the subject of such report satisfies the reporting history requirements (without regard to Form S–3 or Form F–3 eligibility) and minimum float provisions of such subsections for purposes of the Commission's rules and regulations under the Federal securities laws and the rules of any self-regulatory organization, as if revised and implemented in accordance with subsections (a) and (b).

(2) STATUS OF COVERED INVESTMENT FUND.—After such period and until the Commission has adopted revisions to section 230.139 and FINRA has revised rule 2210, for purposes of subsection (c)(7)(O) of such rule, a covered investment

fund shall be deemed to be a security that is listed on a national securities exchange and that is not subject to section 24(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–24(b)).

(3) COVERED INVESTMENT FUNDS COMMUNICATIONS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), communications that concern only covered investment funds that fall within the scope of section 24(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–24(b)) shall not be required to be filed with FINRA.

(B) EXCEPTION.—FINRA may require the filing of communications with the public if the purpose of those communications is not to provide research and analysis of covered investment funds.

(e) DEFINITIONS.—For purposes of this Act:

(1) The term "covered investment fund research report" means a research report published or distributed by a broker or dealer about a covered investment fund or any securities issued by the covered investment fund, but not including a research report to the extent that it is published or distributed by the covered investment fund or any affiliate of the covered investment fund.

(2) The term "covered investment fund" means—

(A) an investment company registered under, or that has filed an election to be treated as a business development company under, the Investment Company Act of 1940 and that has filed a registration statement under the Securities Act of 1933 for the public offering of a class of its securities, which registration statement has been declared effective by the Commission; and

(B) a trust or other person—

(i) issuing securities in an offering registered under the Securities Act of 1933 and which class of securities is listed for trading on a national securities exchange;

(ii) the assets of which consist primarily of commodities, currencies, or derivative instruments that reference commodities or currencies, or interests in the foregoing; and

(iii) that provides in its registration statement under the Securities Act of 1933 that a class of its securities are purchased or redeemed, subject to conditions or limitations, for a ratable share of its assets.

(3) The term "FINRA" means the Financial Industry Regulatory Authority.

(4) The term "research report" has the meaning given that term under section 2(a)(3) of the Securities Act of 1933 (15 U.S.C. 77b(a)(3)), except that such term shall not include an oral communication.

(5) The term "self-regulatory organization" has the meaning given to that term under section 3(a)(26) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(26)).

PURPOSE AND SUMMARY

Introduced by Representative Hill on February 7, 2017, H.R. 910, the Fair Access to Investment Research Act, fixes a problem that the Securities and Exchange Commission (SEC) has known about since 2001, which inhibits the free flow of investment research. The bill directs the SEC to revise its regulations to create a safe harbor for certain publications or distributions of research reports by brokers or dealers distributing securities, such as Exchange Traded Funds (ETFs). The revised regulation shall declare that the investment funds research report shall not be deemed to constitute an offer for sale nor an offer to sell a security that is the subject of the offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective. The covered investment fund research report would satisfy the regulation's requirements as well as those of any self-regulatory organization. The bill prohibits the SEC from imposing specified conditions and requirements when implementing the safe harbor.

BACKGROUND AND NEED FOR LEGISLATION

An ETF is an investment company whose shares are traded intraday on securities exchanges at market-determined prices. In-

vestors may buy or sell ETF shares through a broker or brokerage account just as they would the shares of any publicly traded company. In the U.S., most ETFs are structured as open-end investment companies or unit investment trusts, but other structures also exist—primarily for ETFs investing in commodities, currencies, and futures. Investor interest in ETFs has increased significantly in recent years. Over the past three decades, ETFs have grown from about 100 funds with $100 billion in assets to over 6,000 worldwide funds with almost $3 trillion in assets. Yet despite their growing popularity and increasing importance to retail investors, anomalies in the safe harbor rules have discouraged most broker-dealers from publishing research regarding ETFs.

The SEC has implemented safe harbors, which the bill largely mirrors, for research issued in support of other asset classes, including listed equities, corporate debt, and closed-end funds. Congress also has provided explicit safe harbors for research covering certain securities offerings. Title I of the JOBS Act explicitly provided a safe harbor for research related to offerings of EGC securities. Yet despite their similarities to these other asset classes, research that covers open-ended funds and ETFs does not benefit from similar safe harbors. Consequently, broker-dealers do not publish research regarding ETFs, depriving investors of useful information when deciding whether to invest in this product.

In 2004, as part of its Securities Offering Reform proposal, the SEC requested public comment on whether research relating to ETFs should be protected by a safe harbor. While comments were universally supportive, the SEC did not adopt a final rule.

At a May 13, 2015 Capital Markets and Government Sponsored Enterprises Subcommittee hearing, U.S. Chamber of Commerce Senior Vice President Tom Quaadman testified that:

> existing impediments prevent investors from obtaining decision-useful information regarding ETFs . . . Under the Exchange Acts, broker-dealers currently have safe harbors to public research on equity offerings. However, ETFs and openended funds do not have similar specific safe harbors, thereby causing enough legal vagueness to restrict information and research that may be helpful to investors. Despite receiving comments supporting an extension of the safe harbor rules to ETFs and open ended funds, the SEC has not adopted a final rule.

HEARINGS

The Committee on Financial Services' Subcommittee on Capital Markets and Government Sponsored Enterprises held a hearing examining matters relating to a previous version of this legislation on May 13, 2015.

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on March 9, 2017, and ordered H.R. 910 to be reported favorably to the House as amended by a recorded vote of 56 yeas to 2 nays (recorded vote no. FC–32), a quorum being present. An amendment offered by Representative Hill was agreed to by voice vote.

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. An amendment offered by Mr. Hill was agreed to by a voice vote. 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 56 yeas to 2 nays (Record vote no. FC–32), a quorum being present.

Record vote no. FC-32

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			
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)							
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. 910 will enhance the quantity and quality of information available to investors by providing for a safe harbor for research reports covering Exchange Traded Funds.

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.

COMMITTEE COST ESTIMATE

The Committee adopts as its own 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, March 30, 2017.

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. 910, the Fair Access to Investment Research 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.

Enclosure.

H.R. 910—Fair Access to Investment Research Act of 2017

H.R. 910 would expand an existing safe harbor to allow brokers and dealers to issue or distribute a broader set of research reports about certain investment funds or securities without such reports

being considered as an offering for the sale of shares of those funds or securities. Under current law, such reports would be considered an offering for sale and the broker or dealer would be required to file a registration statement with the Securities and Exchange Commission (SEC) for that offering.

Based on an analysis of information from the SEC, CBO estimates that the agency would require six additional staff to conduct a rulemaking and implement the broadened safe harbor exemption. CBO estimates that implementing H.R. 910 would cost $2 million over the 2017–2022 period. However, under current law, 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. 910 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 910 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

If the SEC increases fees to offset the costs of implementing the requirements in the bill, H.R. 910 would increase the cost of an existing mandate, as defined in the Unfunded Mandates Reform Act (UMRA), on private entities required to pay those fees. Based on information from the SEC, CBO estimates that the incremental cost of the mandate would amount to no more than $2 million over the 2018–2022 period.

The bill also would impose intergovernmental and private-sector mandates as defined in UMRA to the extent that it would eliminate an existing right of action that allows plaintiffs (public and private investors) to pursue damage claims against broker-dealers who issue research reports on exchange-traded funds. If enacted, the bill could cause investors to lose the ability to sue broker-dealers who provide their own research about such funds on grounds other than fraud. To date, CBO has found no cases that successfully establish liability for information contained in or missing from such research reports and expects few, if any, in the future.

Therefore, CBO estimates the total cost of the mandates on public and private entities would fall well below the annual thresholds established in UMRA for intergovernmental and private-sector mandates ($78 million and $156 million in fiscal year 2017, respectively, adjusted annually for inflation).

On March 30, 2017 CBO transmitted a cost estimate for S. 327, the Fair Access to Investment Research Act of 2017, as reported by the Senate Committee on Banking, Housing, and Urban Affairs on March 13, 2017. The two bills are similar and CBO's estimate of their budgetary effects is the same.

The CBO staff contacts for this estimate are Stephen Rabent (for federal costs), Logan Smith (for private-sector mandates), and Rachel Austin (for intergovernmental mandates). The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

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

H.R. 910 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to section 3(c)(5) of rule XIII, the Committee states that no provision of H.R. 910 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULEMAKING

Pursuant to section 3(i) of H. Res. 5, 115th Cong. (2017), the Committee states that H.R. 910 contains one directed rulemaking.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This Section cites H.R. 910 as the "Fair Access to Investment Research Act of 2017."

Section 2. Safe harbor for investment fund research

This section directs the Securities and Exchange Commission to revise its rules to establish a safe harbor for covered investment fund research reports and provides an interim safe harbor if the SEC fails to revise such rules within the time period covered by the Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

H.R. 910 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.

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