AFR Americans for Financial Reform

May 30, 2023

The Honorable Kevin McCarthy
Majority Leader
U.S. House of Representatives
Washington, DC 20510

The Honorable Hakeem Jeffries
Minority Leader
U.S. House of Representatives
Washington, DC 20510

Re: Opposition to Legislation Scheduled for Consideration on House Suspension Calendar

Dear Speaker McCarthy and Leader Jefferies:

Americans for Financial Reform (AFR) writes to oppose the following bills, which would expose investors to private offerings that fail to provide them with detailed disclosures. As you know, some or all of these bills may be considered this week by the House.

As a preliminary matter, AFR is concerned that the legislation at issue is emblematic of a recent and troubling trend of policies that encourage issuers to shirk the disclosure-based framework of federal securities laws by making it easier for issuers to raise in the so-called private securities marketplace.[1] As Congress made clear at the time of their adoption, the purpose of the federal securities laws are to provide the investing public with critical information about securities offerings and the companies conducting securities offerings.[2] By encouraging companies to raise investment capital outside the framework of the securities law – that is, via the sale of securities that are exempt from registration requirements in the so called "private" offering marketplace – Congress risks undermining the transparency and robust investor protections that have historically been the hallmark of U.S. capital markets, and their greatest strength.

AFR is also deeply concerned that, in pursuing policies to effectuate further growth of the private securities marketplace, Congress is poised to weaken investor protection, and deprive retail investors of the information they require to invest successfully.

1. **H.R. 835, the Fair Investment Opportunities for Professional Experts Act**

[1] The Securities Act of 1933 (the "Securities Act") requires that every offer or sale of securities be registered with the Securities and Exchange Commission ("SEC" or "the Commission") or be exempt from registration. The Securities Exchange Act of 1934 (the "Exchange Act") works in tandem with the Securities Act and requires ongoing reporting of sufficiently "large" and widely held companies. Collectively, these two laws form the bedrock of the federal securities laws governing the offer and sale of securities.
[2] H.R. Rep. No. 73-85 (1933).

H.R. 835 would expand the eligibility criteria for "accredited investor" status for purposes of participating in private offerings of securities to include individuals determined by the SEC to have "qualifying professional knowledge" through educational or professional experience. The bill would also amend the Securities Act to add specified, inflation-adjusted income and net-worth standards to the "accredited investor" definition, on a *going forward* basis.

The framework for determining accredited investor status has not been changed in a meaningful way since it was adopted in 1982, and AFR agrees that modernization is long overdue. At the same time, we do not support this legislation, and we believe Congress can and should do better. Specifically, AFR is strongly opposed to provisions in the bill that would codify the income and net worth standards used in the accredited investor definition at the present level, set forth by SEC rules adopted in 1982.[3] More broadly, AFR urges that Congress's primary focus at this time be on reinvigorating our public markets, as opposed to facilitating additional private offerings to additional investors.

We urge the House to reject H.R. 835.

2. H.R. 2797, the Equal Opportunity for All Investors Act

The Equal Opportunity for All Investors Act would expand the universe of individuals who may be considered an accredited investor for purposes of participating in private offerings of securities to include individuals that qualify through an examination established by the SEC and administered by the Financial Industry Regulatory Authority (FINRA). Under the bill, the SEC would be required to design the examination to ensure an appropriate level difficulty such that an individual with financial sophistication or training would be unlikely to fail.

The examination contemplated by H.R. 2797 would offer a pathway to accredited status in lieu of qualification under the existing income or net worth tests. The bill fails to account for the fact that accredited investors are required not merely to be financially sophisticated, but also be able to sustain the potential losses associated with investing in risky and illiquid private offerings.

The SEC considered and rejected the idea of qualification as an accredited investor by means of an examination in 2020. We urge the House to similarly reject H.R. 2797.

3. H.R. 1579, the Accredited Investor Definition Review Act

H.R. 1579 would require the SEC "to incorporate additional 'certifications, designations, or credentials that further the purpose of the accredited investor definition' within 18 months, and thereafter, assess the addition of certifications, designations or credentials every 5 years.

[3] The practical significance of such a policy would be to disregard the erosive effects of 41 years of inflation.

Like the two bills discussed previously, H.R. 1579 fails to address the fundamental problems investors face with the inherent opaqueness of private offerings. Also like the other bills addressed, the SEC carefully considered the question of qualification by virtue of a certification, designation, or other similar credential in 2020.[4] In explaining its decision not to move forward with such an approach (except with respect to a small set of securities licensing examinations), the Commission noted that "Although other professional certifications, designations, and credentials, such as other FINRA exams, a specific accredited investor exam, other educational credentials, or professional experience received broad commenter support, we are taking a measured approach to the expansion of the definition and including only the Series 7, 65, and 82 in the initial order. While we recognize that there may be other professional certifications, designations, and credentials that indicate a similar level of sophistication in the areas of securities and investing, we believe it is appropriate to consider these other credentials after first gaining experience with the revised rules."[5]

By requiring the SEC to initiate a review of qualifying credentials or designations within 18 months of enactment, and on a recurring basis thereafter, H.R. 1579 would deprive the Commission of its ability to pursue a "measured approach," and deny it the ability to gain the experience it has requested with respect to the recent revisions to its rules.

AFR supports policymaking that is informed by data and experience and agrees with the SEC's decision to pursue a careful and measured approach with respect to the introduction of new methods to qualify for accredited investor status. As such, we oppose H.R. 1579.

4. **H.R. 2610, a bill to amend the Securities Exchange Act of 1934 to specify certain registration statement contents for emerging growth companies, to permit issuers to file draft registration statements with the Securities and Exchange Commission for confidential review, and for other purposes**

H.R. 2610 would codify a requirement that would allow all issuers (versus just emerging growth companies under current law) to receive a confidential review of their draft registration statements instead of immediately filing a registration statement for the public to review. The effect of the bill would be to cement into place SEC rules that extend confidential filing privileges initially reserved for emerging growth companies to all companies.

Like many of the other securities bills listed for potential consideration in the House this week, the overarching effect of H.R. 2610 would be to cement into place policies that reduce information available to investors about the securities they buy, sell, and hold. In this case, the bill would permanently remove a key window that analysts previously enjoyed into companies that are preparing to go public through an initial public offering, or IPO.

[4] See SEC Final Rule, Accredited Investor Definition, Release No. 33-10824 (Aug. 26, 2020)
[5] Ibid.

We urge the House to reject H.R. 2610.[6]

Similar to H.R. 2610, we oppose H.R. 2793 as allowing all issuers to submit confidential draft registration statements to the SEC staff for review, as it would also take away the ability of investors and analysts to get early insights into a company's registration statements that contain important disclosures, and done so in a way where issuers are strictly liable for errors, rather than obtaining feedback from the SEC staff in secret.

5. **H.R. 2608 would exempt Emerging Growth Companies (EGCs) taking over other companies from having to file financial statements for the acquired company that precedes the earliest audited financial statements of the EGC itself.**

We oppose H.R. 2608 as it would unnecessarily preclude the SEC and investors from obtaining important financial statements from the combined emerging growth company's early years with little justification. Emerging growth companies have a high failure rate similar to other nascent startups and investors should be provided more information for investments in EGCs not less.

More broadly, AFR agrees with state securities regulators that "a key lesson of the JOBS Act of 2012 is that the reduction of the disclosure requirements for EGCs did not lead to an increase in IPOs or improve the quality of public offerings."[7] AFR reiterates its call for Congress to focus its attention on improving America's public securities marketplace, and its conviction that the best way to do that is through policies that promote disclosure and investor protection.

Thank you for your attention to AFR's views. Please do not hesitate to contact Andrew Park at andrew@ourfinancialsecurity.org if you have any questions or concerns.

Sincerely,

Americans for Financial Reform

CC: The Honorable Patrick McHenry
The Honorable Maxine Waters

[6] For many of the same reasons, AFR is opposed to H.R. 2793, the Encouraging Public Offerings Act of 2023, which would also codify expansions with respect to confidential filings.
[7] Written Testimony of Maryland Securities Commissioner Melanie Senter Lubin. April, 2023. Accessible at https://docs.house.gov/meetings/BA/BA16/20230419/115754/HHRG-118-BA16-Wstate-SenterLubinM-20230419.pdf (P. 23})