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United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

July 23, 2021

Memorandum

To: Members, Committee on Financial Services
From: FSC Majority Staff
Subject: July 28, 2021, Full Committee Markup

The full Committee will convene to mark up the following measures, in an order to be determined by the Chairwoman at 10:00 A.M. on Wednesday, July 28, 2021, and subsequent days if necessary, in room 2128 of the Rayburn House Office Building.

1. **Amendment in the Nature of a Substitute to H.R. 935, Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2021 (Huizenga)**

Summary: This bill codifies a Securities and Exchange Commission (SEC) no action letter that exempts certain merger-and-acquisition brokers from securities registration requirements that facilitate the transfer of ownership in privately held companies with earnings or revenues under specified thresholds, provided such brokers meet certain conditions.

Background: Pursuant to the Securities Exchange Act of 1934, a broker-dealer must file an application to register with the SEC in order to facilitate any sale or purchase of securities. Registration is intended to protect investors and sellers from brokers who may violate antitrust laws or otherwise disregard securities laws. However, the services of a brokerage firms can become expensive for small or medium businesses.[1] Smaller companies may lack the resources and knowledge about the Securities Exchange Act of 1934 (Exchange Act) to even properly deal with what is required of them.

In 2014, the SEC issued a no-action letter (2014 NAL) in response to a letter regarding the sale of a privately held company without registering as a broker-dealer pursuant to Section 15(b) of the Exchange Act.[2] This letter provides exemptive relief to privately held companies without securities registered regarding the registration of broker-dealers. If a private company does not have securities, or is not required to register securities with SEC pursuant to the Exchange Act, it may use an unregistered broker to facilitate mergers, acquisitions, etc. In the 2014 NAL, the SEC provided several requirements that are reflected in the proposed bill.

[1] Investopedia. Selecting Mergers & Acquisitions Advisory Firms for Small Businesses, (March 19, 2020).
[2] *See* SEC Division of Trading and Markets, No-Action Letter re: M&A Brokers, (Jan. 31, 2014).

H.R. 935 is supported by: the U.S. Chamber of Commerce[3] and the North American Securities Administrators Association.[4] The bill or a similar version is opposed by SIFMA[5] and Americans for Financial Reform.[6] A similar version of this bill, H.R. 477, passed the House in 2017 by a vote of 426-0.

2. Amendment in the Nature of a Substitute to H.R.2265 - Financial Exploitation Prevention Act of 2021 (Wagner)

Summary: This bill would codify an SEC no action letter by amending the Investment Company Act of 1940 to allow a company or agent of the company to postpone a payment or redemption of security, provided they meet certain conditions, when they suspect the request of payment or redemption is the result of exploitation of an elder. The postponement period may not extend past 15 business days. Additionally, the SEC is tasked with submitting a report to Congress with legislative recommendations to address the financial exploitation of seniors.

Background: Adults over the age of 65 are often subject to financial exploitation and become victims of financial crime.[7] The FBI reports that the cost of financial fraud on seniors is more than $3 billion a year.[8] Seniors are more vulnerable to financial scams due to a number of factors—poor health, fixed income, and smaller social networks.

In 2018, FINRA enacted Rule 2165 to allow brokers to step in if they suspect that their elderly client is the victim of a financial crime.[9] Brokers may place a temporary pause on any transactions of their elderly client for up to fifteen days. Within two days of the initial pause, the brokers are required to contact the authorized users of the count and the Trusted Contact Person to notify them of the reason for the account's hold unless the broker believes those individuals to be involved in the financial exploitation. The same year, the SEC released a no action letter (NAL 2018), stating they would not take action against a registered open-end investment company or its SEC-registered transfer agent who, under certain specified conditions, paused a transaction under the reasonable belief that the client was the victim of financial exploitation.[10]

3. Amendment in the Nature of a Substitute to H.R. 3332, the "Manufactured Housing Community Preservation Act of 2021" (Axne)

Summary: Through the Department of Housing and Urban Development, this bill would assist nonprofits, resident-formed cooperatives, public housing authorities, and other local entities purchase, preserve, and maintain affordable manufactured housing communities.

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[3] U.S. Chamber of Commerce, Statement on Legislative Proposals to Enhance Capital Formation and Reduce Regulatory Burdens to the House Committee on Financial Services, (Apr. 29, 2015).
[4] NASAA, Letter to Senator Crapo re: The Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2017, (Mar. 9, 2018).
[5] SIFMA, Letter to Chairman Hensarling and Ranking Member Waters re: The Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2017, (Oct. 10, 2017).
[6] Americans for Financial Reform, Letter to Congress re: The Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2017, (Dec. 7, 2017).
[7] SEC Office of Investor Advocate, How the SEC Works to Protect Senior Investors, (May 2019).
[8] FBI Elder Fraud.
[9] FINRA, Rule 2165 Financial Exploitation of Specified Adults, (Feb. 5, 2018).
[10] See SEC Division of Investment Management, No-Action Letter: Investment Company Institute (June 1, 2018) (sec.gov), (June 1, 2018).

Background: Manufactured housing communities often offer one of the best or only options for naturally occurring affordable housing to millions of individuals, including low-income families, seniors on limited incomes, people with disabilities, and those living in high-cost cities.[11] However, in recent years, private equity firms and corporate community owners have increasingly been purchasing manufactured housing communities and raising pad lease rents, threatening the affordability of these homes.[12] For example, entities such as Havenpark, which have been financed by Enterprise Community Partner's for-profit subsidiary, Bellwether Enterprise,[13] have increased pad lease rents by over 70% and pushed off much-needed upgrades to communities, which have resulted in the eviction and displacement of residents, as well as the further deterioration of community quality.[14]

In order to offset predatory market forces, H.R. 3332 would authorize $500 million over 5 fiscal years to assist nonprofits, resident-formed cooperatives, and other local entities in purchasing manufactured housing communities to preserve the quality and affordability of these communities through awards of up to $2 million or $20,000 per manufactured housing unit, whichever is less. Funds may be used to acquire and preserve manufactured housing, make improvements to common areas and common areas in such communities, and demolish, remove, and replace dilapidated homes in such communities. Additionally, the affordability and resident, nonprofit, or local ownership of communities must be maintained for no less than 30 years.

This bill is supported by the following organizations: MHAction, National Housing Law Project, Prosperity Now, ROC USA, Manufactured Housing Institute.

4. Amendment in the Nature of a Substitute to H.R. 3555, the "Voters on the Move Registration Act of 2021" (Williams)

Summary: This bill would require public housing authorities, owners of HUD-assisted housing, and lenders of federally-backed single- and multi-family mortgages to provide tenants and mortgage loan applicants with a uniform statement, developed by the Consumer Financial Protection Bureau (CFPB) in consultation with the Election Assistance Commission, that includes information on how to register to vote in multiple languages.

Background: Voter suppression continues to be a challenge as many states have erected barriers to voting by enacting stringent voter ID laws, shortening voting hours, restricting registration, and purging voter lists.[15] Some states require voters to have specific forms of identification and proof of citizenship in order to register, while other states have reportedly purged names from the roll of registered voters.[16] Many of these requirements have been challenged in courts as disproportionately preventing protected classes of people from voting. The pandemic has also raised additional concerns about voting rights as many households have experienced housing instability which could affect their ability to vote if they fail to update their voter registration once their permanent address changed.[17]

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[11] *See e.g.*, National Consumer Law Center, *Promoting Resident Ownership of Communities*, (Jan. 2020).
[12] Private Equity Stakeholder Project, *Private Equity Giants Converge on Manufactured Homes: How Private Equity Is Manufacturing Homelessness & Communities Are Fighting Back* (Feb. 2019).
[13] REjournals, *Bellwether Enterprise closes $267 million in loans in August*, (Mar. 26, 2017).
[14] Sheelah Kolhatkar, The New Yorker, What Happens When Investment Firms Acquire Trailer Parks, (Mar. 15, 2021); *See also* NPR, Losing It All: Mobile Home Owners Evicted Over Small Debts During Pandemic, (Apr. 16, 2021).
[15] Amy McKeever, Voter Suppression Has Haunted America Since It Was Founded, (Aug. 21, 2020).
[16] National Low Income Housing Coalition, A History of Voter Suppression, (Sept. 23, 2020).
[17] *Id.*

In part due to ongoing racial residential segregation,[18] place-based voter suppression tactics also make it easier to identify and suppress votes among certain communities, especially low-income communities and communities of color.[19] During election cycles, there are often reports of voters of color, especially voters in predominately Black precincts, being forced to wait in longer lines to vote.[20] The practice of closing and limiting the number of voting centers located in communities of color[21] can often deter people from casting their votes and exercising their right to vote.[22] Lack of information on how to register to vote can also be a barrier to exercising the right to vote, especially for lower-income households who tend to move more frequently but who may not remember or be aware that they need to register to vote under their new address.[23]

By providing voter registration information early on in the moving process, H.R. 3355 will ensure voters have the information they need to register to vote and make their voices heard. The bill requires that the CFPB, in consultation with the Election Assistance Commission, create a uniform statement that certain landlords and lenders must provide to renters and borrowers, either upon leasing a unit or upon applying for a mortgage loan. The CFPB would also be required to provide the uniform statement translated into the top ten languages most commonly spoken by persons with limited English proficiency, as determined by the U.S. Census Bureau.

This bill is supported by the following organizations: Common Cause, National Consumer Law Center (on behalf of its low-income clients), National Housing Law Project, and National Low Income Housing Coalition.

5. Amendment in the Nature of a Substitute to H.R. 4590 "Promoting New and Diverse Depository Institutions Act" (Auchincloss)

Summary: The Amendment in the Nature of a Substitute (ANS) to H.R. 4590 would require Federal banking regulators to conduct an 18-month study examining challenges prospective *de novo* depository institutions face. (A *de novo* depository institution is a newly chartered depository institution.) The ANS would also require Federal banking regulators to develop a strategic plan based on the study to promote the creation of newly chartered depository institutions, especially minority depository institutions (MDIs) and community development financial institutions (CDFIs), in a manner that promotes increased access to financial services, including in banking deserts, as well as safety and soundness, consumer protection, and community reinvestment.

[18] Stephen Menendian et al, Othering & Belonging Institute at UC Berkeley, The Roots of Structural Racism Project: Twenty-First Century Racial Residential Segregation in the United States, (Jun. 21, 2021); *See also* William H. Frey, Brookings Institution, Even as metropolitan areas diversify, white Americans still live in mostly white neighborhoods, (Mar. 23, 2020).
[19] Kelsey Yandura, Supermajority News, Redlining Was Banned Over 50 Years Ago. It Still Makes Voting Difficult for Black Americans Today, (Oct. 6, 2020).
[20] Matt Vasilogambros, The Pew Charitable Trust, Voting Lines Are Shorter — But Mostly for Whites, (Feb. 15, 2018).
[21] NPR, Why Do Nonwhite Georgia Voters Have To Wait In Line For Hours? Too Few Polling Places, (Oct. 17, 2020).
[22] Carnegie Corporation of New York, Black and Latino Voters Face Longer Wait Times on Election Day, (Sept. 18, 2020).
[23] Will Fischer, *Research Shows Rental Assistance Reduces Hardship and Provides Platform to Expand Opportunity for Low-Income Families*, Center for Budget and Policy Priorities (Dec. 5, 2019).

Background: Since the 1980s when interstate banking rules were relaxed, the banking industry has steadily consolidated.[24] In 1985, there were more than 18,000 banks; today, there are fewer than 5,000.[25] There has been similar consolidation of credit unions: in 1985, there were more than 15,000 credit unions; today, there are a little more than 5,000 credit unions.[26] Moreover, despite a mandate that banking regulators work to preserve the number of MDIs and encourage the creation of new MDIs pursuant to Section 308 of Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), there has been a one-third decline in the number of MDIs since the 2008 financial crisis, with a more steep 52 percent decline in the number of Black-owned banks.[27]

While the industry consolidation has taken place at a steady pace over the past few decades, the formation of *de novo* depository institutions has slowed considerably in recent years. Between 2009 and 2019, 64 new banks were chartered, which is a fraction of new creations when compared to 1,837 new banks that were chartered between 1998 and 2008. There have been a range of reasons given for this development. For example, while some have suggested these developments are driven by regulatory factors, research by the Federal Reserve suggests there may be a stronger correlation between the number of new banks formed in recent years and the interest rate environment and other non-regulatory factors.[28] Even at times when more *de novo* banks are being chartered, research has shown that new banks are financially fragile, in some cases failing at more than twice the rate established banks fail.[29]

In response to these developments, Congress provided $12 billion in capital investment and grant programs to support MDIs as well as CDFIs in December 2020.[30] While Federal banking regulators have advanced their own initiatives in recent years to support MDIs and CDFIs as well as the formation of *de novo* depository institutions,[31] regulators have not conducted a joint study or detailed a strategic plan on steps that could be taken to encourage the formation of new depository institutions, including MDIs and CDFI depository institutions. H.R. 4590 would require them to do so.

H.R. 4590 is supported by the following organizations: American Bankers Association, California & Nevada Credit Union Leagues, Community Development Bankers Association, Credit Union National Association, Inclusiv, Independent Community Bankers Association, National Association of Federally-Insured Credit Unions, National Bankers Association, and National Community Reinvestment Coalition.

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[24] *See* Testimony of Sarah Edelman, Center for American Progress, before the House Subcommittee on Financial Institutions and Consumer Credit hearing entitled, *Ending the De Novo Drought: Examining the Application Process for De Novo Financial Institutions* (Mar. 21, 2017).

[25] FDIC, *BankFind Suite: Find Annual Historical Bank Data* (accessed July 22, 2021), and FDIC, *Quarterly Banking Profile* (First Quarter 2021).

[26] NCUA, *1985 Annual Report* (April 1986), and NCUA, *Quarterly Data Summary Reports* (First Quarter 2021).

[27] Specifically, in 2008, there were 215 MDI banks, including 42 Black-owned banks, and today, there are 142 MDI banks, including only 20 Black-owned banks. *See* FDIC, *Minority Depository Institutions Program* - Historical Data Year-by-Year 2001 - 2020 (accessed July 22, 2021). As of 2013, there were 805 MDI credit unions compared to 527 MDI credit unions today. *See* NCUA, *Minority Depository Institution Preservation* (accessed July 22, 2021).

[28] Robert M. Adams and Jacob P. Gramlich, Federal Reserve Board, *Where Are All the New Banks? The Role of Regulatory Burden in New Charter Creation*, (Dec. 16, 2014).

[29] *See* Yan Lee and Chiwon Yom, FDIC, *The Entry, Performance, and Risk Profile of De Novo Banks*, (Apr. 7, 2016).

[30] House Financial Services Committee, *One pager on the provisions providing Emergency Support for CDFIs and MDIs in the December COVID-19 stimulus package* (Dec. 2020).

[31] See, e.g., FDIC, *FDIC Rescinds De Novo Time Period Extension; Releases Supplemental Guidance on Business Planning* (Apr. 6, 2016); FDIC, Investing in the Future of Mission-Driven Banks - A Guide to Facilitating New Partnerships; OCC, *OCC Marks the First Anniversary of Project Reach* (Jul. 15, 2021).

6. Amendment in the Nature of a Substitute to H.R. 4616, "the Adjustable Interest Rate (LIBOR) Act of 2021" (Sherman)

Summary: This bill would establish a process for certain financial contracts that reference the London Interbank Offered Rate (LIBOR) and do not contain sufficient language that would allow them to continue to function as originally intended after LIBOR is discontinued, to instead reference Secured Overnight Financing Rate (SOFR), or an appropriately adjusted form of SOFR without the need to be amended or subject to litigation. The bill directs the Federal Reserve Board to issue regulations regarding the appropriate SOFR or adjusted SOFR replacement reference interest rate that should be used for specific categories of LIBOR-based contracts that fall within the scope of the legislation.

Background: LIBOR is a daily reported reference rate at which large banks indicate that they can borrow short-term, wholesale funds from one another on an unsecured basis.[32] In order to calculate LIBOR, a "self-selected, self-policing committee of the world's largest banks" self-report their daily estimated borrowing costs to the Financial Conduct Authority (FCA), the U.K. financial regulator.[33] As of the 4th quarter of 2020, it is estimated that there are $223 trillion in outstanding exposures to USD LIBOR.[34]

LIBOR's self-reporting structure has created opportunities for individuals or institutions to manipulate or falsify data. In the wake of the 2008 financial crisis, upon discovering a widespread culture of LIBOR manipulation built around industry relationships,[35] U.S. and U.K. regulators settled with various banking institutions, including some of the world's largest banks such as Barclays, JP Morgan Chase, Citigroup, and UBS, over allegations that these institutions manipulated LIBOR[36] by pressuring their colleagues to report artificially low or high interest rates in order to manufacture trading opportunities.[37]

Though its decision was not explicitly linked to the numerous LIBOR rigging scandals, the FCA announced in 2017 that it would no longer compel banks to report LIBOR after December 31, 2021, and would discontinue its publication.[38] However, in response to the global COVID-19 pandemic, the ICE Benchmark Administration (IBA) announced that it would not cease publication of the overnight and 1, 3, 6, and 12 months USD LIBOR settings until June 30, 2023.[39]

The Treasury Department's Financial Stability Oversight Council (FSOC) has identified the "cessation of degradation of LIBOR" as having the potential to "significantly disrupt" financial markets.[40] FSOC has also expressed concerns that if market participants fail to "adequately adapt" to an alternative reference rate, there may be a risk to the liquidity and the stability of the markets.[41] The SEC has similarly warned that LIBOR's discontinuation may pose significant risks to the markets.[42] Former Treasury Secretary Steven Mnuchin also suggested that legislation may be necessary to address contracts that reference LIBOR and lack appropriate fallback language.[43] More recently, while testifying before the House Financial Services Committee, both Treasury Secretary Janet Yellen and Federal Reserve Chair Jerome

[32] Federal Reserve Bank of New York, LIBOR: Origins, Economics, Crisis, Scandal, and Reform, (Mar. 2014).
[33] The Guardian, LIBOR Scandal: The Bankers Who Fixed the World's Most Important Number, (Jan. 2017).
[34] Federal Reserve Bank of New York, Alternative Reference Rates Committee, Progress Report: The Transition from U.S. Dollar LIBOR, (Mar. 31, 2021).
[35] The New York Times, Deutsche Bank to Pay $2.5 Billion Fine to Settle Rate-Rigging Case, (Apr. 23, 2015).
[36] The New York Times, Tracking the LIBOR Scandal, (Mar. 23, 2016).
[37] Council on Foreign Relations, Understanding the LIBOR Scandal, (Oct. 12, 2016).
[38] Lexology, The end of LIBOR – what does that mean for international banks, (Dec. 12, 2019).
[39] Bloomberg, LIBOR enters 'final chapter' as global regulators set end dates, (Mar. 11, 2021).
[40] U.S. Department of Treasury, FSOC 2019 Annual Report.
[41] *Id.*
[42] SEC, Staff Statement on LIBOR Transition, (Jul. 12, 2019).
[43] American Banker, Congress may need to step in on LIBOR switch, Mnuchin Warns, (Dec. 5, 2019).

Powell have stated that they believe it will be necessary for Congress to pass legislation to allow for a smooth transition away from LIBOR in the U.S.[44]

7. Amendment in the Nature of a Substitute to H.R. 4617, "Order Flow Improvement Act" (Sherman)

Summary: This bill directs the SEC to study and consider banning or limiting the payment for order flow (PFOF) in the form of exchange rebates or payments from market centers to broker dealers, conflicts of interest based on PFOF arrangements, and the impact of PFOF on the quality of order execution. The bill also directs the SEC to conduct rulemaking related to the full array of such payments, fees, economic inducements, and in-kind benefits made or assessed by brokers, exchanges and other market participants, and the disclosure made to investors about such payments and fees. The bill also clarifies that the Commission has the authority to regulate, ban, or limit such payments without waiting for the conclusion of the study.

Background: PFOF refers to third parties paying brokerages in exchange for brokerages routing customers' trade orders to the third parties for execution of the trade order.[45] In December of 2000, the SEC conducted a "Special Study: Payment for Order Flow and Internalization in the Options Markets," which concluded, in pertinent part, that "payment for order flow has had an impact on order routing decisions."[46] The SEC also found that firms with policies to accept PFOF tended to direct orders to specialists who paid PFOF.[47] Firms with policies not to accept PFOF directed orders to specialists who paid PFOF less frequently.[48] Earlier this year, market disruptions relating to the trading of GameStop and other meme stocks drew a spotlight on online brokerage firm Robinhood, which had earlier settled with the SEC related to its use of PFOF costing retail customers millions of dollars in inferior trade prices.[49] Internationally, PFOF has been banned in Canada[50] and in the United Kingdom.[51]

The SEC's regulatory approach to PFOF has largely involved disclosure requirements aimed at addressing the potential conflicts of interest that PFOF may pose for broker-dealers.[52] In addition to those disclosure requirements, as mentioned above, retail broker-dealers are also required to obtain "best execution" for their customers.[53] This means that if a retail broker-dealer routes customer orders to a market maker, retail broker-dealers such as Robinhood must ensure the market maker will execute the customer's order on the most favorable terms reasonably available in the market.[54] The retail broker-dealer may not, for instance, route an order based solely on which market maker will offer the most incentives to the broker for order flow. However, retail broker-dealers may benefit from submitting a customer's order to the market maker that will pay the most.

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[44] American Banker, Calls intensify for Congress to intervene on LIBOR, (Mar. 27, 2021).
[45] *See* 17 CFR § 240.10b-10. PFOF refers to "any monetary payment … or other benefit that results in remuneration, compensation, or consideration to a broker or dealer from any broker or dealer, national securities exchange, registered securities association, or exchange member in return for the routing of customer orders by such broker or dealer to any broker or dealer, national securities exchange, registered securities association, or exchange member for execution...".
[46] SEC, Special Study: Payment for Order Flow and Internalization in the Options Markets, (Dec. 2000).
[47] *Id.*
[48] *Id.*
[49] *See* SEC Order, *In the Matter of Robinhood Financial, LLC*, Admin. Proc. File No. 3-20171, (Dec. 17, 2020).
[50] Reuters, Canada stock market rules curb platforms linked to churning U.S. stocks, (Feb. 9, 2021).
[51] CFA Institute, PFOF Issue Brief, (July 2016).
[52] *See, e.g.*, 17 CFR § 240.10b-10; 17 CFR § 242.606; and 17 CFR § 242.607.
[53] See FINRA Rule 5310, Best Execution and Interposition, (May 9, 2014).
[54] *Id.*

Most securities exchanges also pay executing brokers for order flow, and these payments, often referred to as "rebates," also constitute a form of PFOF.[55] Some have opined that these rebates "exacerbate conflicts of interest between brokers executing trades and retail clients and institutional clients" and lack transparency.[56] In fact, in December 2018, the SEC voted to adopt Rule 610T of Regulation National Market System to conduct a Transaction Fee Pilot in relation to NMS stocks (Pilot).[57] The purpose of the Pilot, was to collect data that would "be used to facilitate an empirical evaluation of whether the exchange transaction-based fee and rebate structure is operating effectively to further statutory goals and whether there is a need for any potential regulatory action in this area."[58] In particular, the SEC sought to determine whether the $2.5 billion in rebates, reportedly paid in 2018, created "...conflicts of interest by incentivizing brokers to send customer orders to the exchanges that pay the biggest rebates rather than to those that would obtain the best results for the end clients."[59] The New York Stock Exchange, Chicago Board Options Exchange, and Nasdaq, Inc. sued the SEC asserting that the Pilot constituted overreach by the government[60] and, in June 2020, the U.S. Court of Appeals for the District of Columbia ruled against the Commission, arguing that the Commission failed to affirmatively declare that it is responding to a problem that the Pilot may help resolve, and struck down the Pilot.

8. Amendment in the Nature of a Substitute to H.R. 4618, "Short Sale Transparency and Market Fairness Act" (Waters)

Summary: This bill would authorize the SEC to revise the reporting period for 13-F disclosures from quarterly to monthly, revise the time period to submit such reports, expand the list of items to be disclosed to include certain derivatives, direct the SEC to complete rulemaking pursuant to Section 929X of Dodd-Frank, which requires aggregate short positions to be disclosed on form 13F, and direct the SEC to study and report the use of confidential filing requests.

Background: In 1975, Congress amended the Exchange Act to add a new section 13(f) to require certain institutional investment managers to provide quarterly reports to the SEC regarding their holdings of certain equity securities, which the SEC implemented in Rule 13f-1.[61] Such reports are reported quarterly and required to be filed 45 days after the close of a quarter. Such reporting was designed to provide more transparency to the markets about the positions and influence of institutional investors.[62] Last year, the SEC proposed raising the $100 million reporting threshold for 13f filings,[63] which was met with wide-spread, cross-industry criticism for its projected reduction in market transparency.[64]

Volatility surrounding the trading of meme stocks like GameStop and the resulting "short squeeze" in January 2021 have elicited industry and advocacy support for increasing market transparency, including heightened 13f reporting requirements and short sale reporting. At a full Committee hearing, entitled "Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide"

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[55] *See* 17 CFR § 240.10b-10.
[56] *See* SEC, Recommendation of the SEC Investor Advisory Committee Regarding Exchange Rebate Tier Disclosure, (Jan. 24, 2020).
[57] *See* SEC Press Release, SEC Adopts Transaction Fee Pilot for NMS Stocks, (Dec. 19, 2018).
[58] *Id.*
[59] *See* Reuters, Big U.S. exchanges to sue SEC over 'overreaching' fee experiment, (Feb. 15, 2019).
[60] *Id.*
[61] *See* 17 CFR § 240.13f-1.
[62] *Id.*
[63] *See* SEC Proposed Rule, Reporting Threshold for Institutional Investment Managers, Rel. No. 34-89290 (July 10, 2020).
[64] *See, e.g.,* CNBC, Jim Cramer Rips SEC's Proposed Rule Change for Institutional Investors, (July 22, 2020).

on February 18, 2021, Melvin Capital Management CEO, Mr. Gabriel Plotkin, testified that before the company closed its meme stock positions and incurred losses, his firm had been shorting GameStop since Melvin's inception six years earlier.[65] However, knowledge of such positions was not widespread until a few traders posted their analysis that Melvin Capital and others held such positions.

In the wake of the failure of the highly leveraged family office, it has been noted that Archegos was able to increase its leverage by investing in equity total return swaps and contracts for differences, derivatives that institutional investors also use, but which are not required to be disclosed on form 13F.[66] Some have called for reforms in 13f filing requirements that would require institutional investment managers to report monthly, shorten the reporting time deadline, and expand 13f reporting to include "short stock sales; [s]hort option positions; and [d]erivatives that mimic the behavior of stocks, such as [t]otal [r]eturn [s]waps…".[67,68] Such reforms, it has been argued, would improve issuer-stakeholder engagement on corporate governance issues,[69] promote capital formation by enabling "issuers to identify potential investors and attract new and long-term investments necessary for growth."[70]

H.R. 4618 is supported by: Consumer Federation of America, Center for American Progress, Americans for Financial Reform, North American Securities Administrators Association, National Investor Relations Institute, Society for Corporate Governance, National Association of Manufacturers, among others.

9. Amendment in the Nature of a Substitute to H.R. 4619, "to amend the Securities Exchange Act of 1934 to prohibit trading ahead by market makers, and for other purposes" (Green)

Summary: This bill would statutorily prohibit market makers from "trading ahead" or engaging in insider trading. It would also require the CEO of each market maker to annually certify that the CEO has performed reasonable due diligence during the reporting period to ensure the market maker has not engaged in the prohibited activities. The bill would hold the market maker's CEO and Directors of the Board personally liable for violating this prohibition.

Background: Trading ahead is a form of front-running and insider trading.[71] When a broker trades ahead of a client, the broker is purchasing or selling securities for its own account with the inside information about a client order at a price that would satisfy that client's order. Trading ahead harms retail and institutional traders because it makes the purchasing of securities more expensive or lowers the sale price of securities.

Today, FINRA Rule 5320, also referred to as the "Manning Rule", prohibits all FINRA member firms from placing the firm's interest before or above the financial interest of its clients. Every FINRA member firm is required to have written supervisory procedures to prevent trading ahead. Further, FINRA

[65] U.S. House of Representatives, Committee on Financial Services, Hearing entitled, Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, (Feb. 18, 2021).
[66] Americans for Financial Reform, Letter to Acting Chair Lee, (Mar. 31, 2021).
[67] *Id.*
[68] Consumer Federation of America, Letter to SEC re: Reporting Threshold for Institutional Investment Managers, (Sept. 16, 2020).
[69] Stakeholder engagement may include: "ability to consult with shareholders regarding "say on pay," proxy access and other key corporate governance issues." *See* NYSE Euronext, Letter to SEC re: Petition for Rulemaking Under Section 13(f) of the Securities Exchange Act of 1934, (Feb. 1, 2013).
[70] Society for Corporate Secretaries, Letter to SEC re: Reporting Threshold for Institutional Investment Managers, (Sept. 29, 2020).
[71] Government Finance Officers Association, Front-Running, Trading Ahead and the Best Execution Obligation, (May 1996).

members are required to establish information barriers between different trading and research units to prevent one unit with knowledge of a client order from sharing that information with a different unit.[34]

10. Amendment in the Nature of a Substitute to H.R. 4620, "Family Office Regulation Act of 2021" (Ocasio-Cortez)

Summary: This bill would limit the use of the family office exemption from registration as an investment adviser with the SEC to offices with $750 million or less in assets under management, and prevent persons who are barred or subject to final orders for conduct constituting fraud, manipulation, or deceit from being associated with a family office. Family offices with more than $750 million assets under management (AUM) would have to register with the SEC as "exempt reporting advisers" (ERA). The bill would also repeal a grandfathering clause in Sec. 409 of Dodd-Frank Act that permitted family offices that have clients that include persons who are not members of the family to not register. Finally, the bill would authorize the SEC to require, by rule, the registration of family offices that are below the $750 million threshold but are highly leveraged or engage in high-risk activities.

Background: Family offices are private firms that provide investment advice only to "family clients."[72] Under current law, family offices are exempt from registration with the SEC and have no requirement to disclose their size, portfolio, or leverage. Due in part to legislative and regulatory exemptions, family offices have grown in scope and popularity. A 2021 report by Ernst & Young estimated that private family capital outstrips private equity and venture capital combined, with at least 10,000 single family offices across the world.[73] Campden Research estimates that family offices manage nearly $6 trillion in assets.[74]

The recent meltdown of the Archegos Capital Management family office, which led to over $10 billion in losses across some of the world's largest banks,[75] demonstrated that family offices can be deeply interconnected with the rest of the financial markets and their activities could affect the stability of financial markets. News reports suggested that the large bank counterparties to Archegos may not have known that they were all on the same side of the same highly leveraged trade with the family office,[76] due to the lack of public reporting by family offices.[77]

Exempt reporting advisers, a category of registrants that was created by the Dodd-Frank Act,[78] are subject to a lighter regulatory regime similar to the regime for Venture Capital funds, and have tailored reporting requirements. ERAs are required to file limited sections of Form ADV with the SEC.[79]

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[72] Family client definition includes: a family member, former family member, key employee, nonprofit or charitable trust solely funded by one or more family clients. *See* https://www.law.cornell.edu/cfr/text/17/275.202(a)(11)(G)-1; and https://www.sec.gov/news/press/2011/2011-134.htm.

[73] Reuters, Why Archegos Capital was in U.S. regulators' blind spot, (Mar 29, 2021).

[74] *Id.*

[75] WSJ, Archegos Hit Tops $10 Billion After UBS, Nomura Losses, (Apr 27, 2021).

[76] Bloomberg, Archegos Got Too Big for Its Banks, (Apr. 8, 2021) (writing that "[p]resumably every bank that traded with Archegos knew that it was a big user of prime brokerage services; they knew Archegos had a lot of big positions with other banks. But they might not have known that it had essentially the same positions with every bank. There seems to have been a widespread sense in the market that Archegos was long/short, that it had a lot of big long stock positions that it hedged with big short positions, but the reporting since its collapse seems to suggest that Archegos's longs were both bigger and more concentrated than its shorts.").

[77] *Id. See also*, Forbes, Archegoes Sparks Family Office Feud Among Their Billionaire Owners, (May 16, 2021).

[78] *See* https://www.americanbar.org/groups/business_law/publications/blt/2016/10/06_ross/

[79] See https://www.jonesday.com/en/insights/2012/02/exempt-reporting-advisers-requirements-for-investment-advisers-that-qualify-as-venture-capital-advisers-or-private-fund-advisers

11. <u>Amendment in the Nature of a Substitute to H.R. 4685, "Trading isn't a Game Act" (Casten)</u>

Summary: This bill would require the GAO to conduct a study on the positive and negative impacts of the trend of gamification of online trading platforms, such as the use of nudging and other inducement, and require the GAO to issue a report to Congress with recommendation.

Background: Online brokerage platforms are increasingly using psychological behavioral nudges when engaging with their customers, which includes some features commonly referred to as "gamification." Gamification features on platforms such as Robinhood have led to widespread criticism that gamified online trading platforms encourage behavior similar to that of a gambling addict.[80] At a full Committee hearing on the May 6, 2021 entitled "Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part III", SEC Chair Gensler testified that the SEC would review the effects of gamification on retail investors, stating some brokers, like buildings in "Las Vegas and Atlantic City… [are] using psychological prompts and behavioral prompts to get investors to trade more."[81]

Regulatory bodies and advocates have argued that the effects of gamification on retail investors need to be studied and understood as some of the prompts may constitute investment advice.[82] At a full Committee hearing on March 17, 2021 entitled "Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part II," Dr. Vicki Borgen shared that an app's interface and design "influence the type of decision that a retail investor makes almost on an unconscious level" and could elicit "particular behaviors [that are] not beneficial for retail investors." On May 19, 2021 at the annual conference of the Financial Industry Regulatory Authority ("FINRA"), FINRA Vice President, Amy Sochard, announced the organization's desire to gather comments from the public on the practice of gamification.[83]

[80] NBC, Gambling addiction experts see familiar aspects in Robinhood app, (Jan 30, 2021).
[81] U.S. House Committee on Financial Services, Hearing entitled - Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part III, (May 6, 2021).
[82] *See generally*, Gibson Dunn, The GameStop Short Squeeze – Potential Regulatory and Litigation Fall Out and Considerations, (Feb. 1, 2021).
[83] The National Law Review, Game On: FINRA Hints at Upcoming Gamification Sweep, (June 1, 2021).

Appendix A: Section by Section for ANS to H.R. 935, Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2021 (Huizenga)

Section 1. Short Title.

- This section establishes the short title of this bill as the "Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2021".

Section 2. Registration Exemption for Merger and Acquisition Brokers.

- This section amends section 15(b) of the Securities Exchange Act of 1934 to add an exception for M&A broker registration if they assist in the sale of a privately held company. However, the registration exemption does not apply for the following conditions: transmits or custodies assets; engages with a registered issuer or is required to be registered; engages with a shell company, provides or assists with obtaining financing; represents both the buyer and seller; and engages in or binds the transfer of ownership to a buyer, among other conditions.
- Under this section, a privately held company is defined as a company that does not have any securities registered, does not have to file reports to the SEC, and has earnings below $25 million or a gross revenue less than $250 million.

Section 3. Effective Date.

- This section puts this bill into effect 90 days after its enactment.

Appendix B: Section by Section for ANS to H.R.2265 - Financial Exploitation Prevention Act of 2021 (Wagner)

Section 1. Short title.

- This section establishes the short title of the bill as the "Financial Exploitation Prevention Act of 2021".

Section 2. Redemption of Certain Securities Postponed.

- This section amends section 22 of the Investment Company Act of 1940 to allow a registered open-end investment company, or its agent, to pause a redemption of security for no more than fifteen days if they suspect financial exploitation of a security holder that is a specified adult, provided certain conditions are met.
    - This section defines a specified adult as a person 65 and older, or is a person 18 and older with a mental or physical impairment that can't protect their own interest.
- This section directs the SEC to submit a report detailing the regulatory and legislative suggestions to address the financial exploitation of security holders.

Appendix C: Section by Section for ANS to H.R. 3332, the "Manufactured Housing Community Preservation Act of 2021" (Axne)

Section 1. Short title.

- This section establishes the short title of the bill as "Manufactured Housing Community Preservation Act of 2021."

Section 2. Grant Program for Manufactured Housing Preservation.

- This section authorizes $500 million over 5 fiscal years to establish a new matched grant program within the Department of Housing and Urban Development to provide grants of up to $2 million or $20,000 per manufactured housing unit within a manufactured housing community, whichever is less, to help resident-owned entities, nonprofits, public housing agencies, and other locally-drive entities to purchase, preserve, and maintain affordable manufactured housing communities.
- Allocations may be used to preserve communities, repair common areas and community property, or demolish, remove, and replace decrepit homes within the community.
- Communities purchased, preserved, or maintained with such funds would be required to maintain affordability and be managed for the benefit of the residents for no less than 30 years and communities must be owned by eligible entities.

Appendix D: Section by Section for ANS to H.R. 3555, the "Voters on the Move Registration Act of 2021" (Williams)

Section 1. Short title.

- This section establishes the short title of the bill as "Voters on the Move Registration Act of 2021."

Section 2. Inclusion of voter registration information with certain leases and vouchers for federally assisted rental housing and mortgage loan applications.

- This section requires the Director of the Bureau of Consumer Financial Protection, in consultation with the Election Assistance Commission, to develop a uniform statement providing information on individual's voting rights and how they can register to vote.
- This section would require public housing agencies and private owners of housing that receives federal rental assistance, as well as lenders of federally-back mortgages, to provide the uniform statement to tenants together with their lease or with income verification documents, and to borrowers at the time of a mortgage application, as well as to tenants living in properties that are financed using federally-backed mortgages.

Appendix E: Section by Section for ANS to H.R. 4590, "Promoting New and Diverse Depository Institutions Act" (Auchincloss)

Section 1. Short title.

- This section establishes the short title of the bill as "Promoting New and Diverse Depository Institutions Act."

Section 2. Study and Strategic Plan

- This section requires the Federal banking regulators – specifically the Federal Deposit Insurance Corporation (FDIC), Board of Governors of the Federal Reserve System (Fed), Office of Comptroller of the Currency (OCC), National Credit Union Administration (NCUA), and Consumer Financial Protection Bureau (CFPB) – to conduct an 18-month study examining the challenges faced by proposed *de novo* depository institutions, including *de novo* MDIs. The regulators must report to Congress and publish their analysis, findings, and legislative recommendations.
- This section also requires the Federal banking regulators to produce a strategic plan based on the study to encourage the formation of *de novo* depository institutions, including *de novo* MDIs and CDFIs, in a manner that promotes the availability of banking and financial services (especially in banking deserts), safety and soundness, consumer protection, community reinvestment, financial stability, and a level playing field.
- This section also requires the regulators to invite public feedback to inform the study and strategic plan.

Appendix F: Section by Section for ANS to H.R. 4616, "the Adjustable Interest Rate (LIBOR) Act of 2021 (Sherman)

Section 1. Short title.

- This section establishes the short title of the bill as the "Adjustable Interest Rate (LIBOR) Act of 2021"

Section 2. Findings & Purpose

- This section details the reach of LIBOR, the significant number of existing contracts that do not provide for a replacement benchmark when LIBOR is discontinued, the potential of pending litigation for these contracts, and the need to establish a process to replace LIBOR, to limit disruption, preclude litigation, and to permit existing contracts to use an alternative replacement benchmark.

Section 3. Definitions

- This section provides various definitions.

Section 4. LIBOR Contracts

- This section establishes that on the LIBOR replacement date, the Board of Governors of the Federal Reserve System (BOG-FRS) selected Benchmark Replacement will replace LIBOR, that any Fallback Provision in a LIBOR Contract will be null and void, a Determining Person may select the BOG-FRS Replacement Benchmark, that this selection is irrevocable, but if a selection is not made, the Benchmark Replacement shall replace LIBOR. If the Benchmark Replacement does replace LIBOR, the Benchmark Replacement will become part of the LIBOR contract. Nonetheless, this section does not alter or impair written agreements that specify that a LIBOR Contract shall not be subject to this Act.

Section 5. Continuity of Contract and Safe Harbor

- This section clarifies that a BOG-FRS Benchmark Replacement for LIBOR is a commercially reasonable replacement, reasonable and comparable to LIBOR, and is substantial performance for person benefitting or burdened by a LIBOR Contract. The replacement of LIBOR will not impair of affect a person's right to receive payment, discharge performance, unilaterally terminating, constitute a breach of contract, or voiding the LIBOR contract. The use of BOG-FRA Benchmark Replacement will not amend or modify the LIBOR Contract. And, nothing in this section creates a negative inference for a non-BOG-FRS selected Benchmark Replacement.

Section 6. Preemption

- This section permits the bill to preempt all federal and state laws, rules, and regulations for the selection of a benchmark replacement or how interest is calculated.

Section 7. Trust Indenture Act of 1939

- This section amends section 316 of the Trust Indenture Act of 1939 by ensuring that the right of any bond holder of an indenture security to receive payment of principal or interest will not be impaired by LIBOR replacement.

Section 8. Rulemaking

- This section requires the BOG-FRS to issue regulations to administer and carry out this Act.

Appendix G: Section by Section for ANS to H.R. 4617, "to amend the Securities Exchange Act of 1934 to study payment for order flow" (Sherman)

Section 1. Short title.

- This section establishes the short title as "Order Flow Improvement Act".

Section 2. Prohibition on Certain Payment for Order Flow

- (a) This section directs the SEC to carry out a study for PFOF received by brokerage firms from market participants and requires that the study address, among other matters, the following: PFOF arrangements, customer disclosure, PFOF conflicts and steps brokers take to mitigate, impact on order execution at best available prices and quality.
- (b) This section requires the SEC to issue the report in 180 days of enactment.
- (c) This section requires the SEC to revise its rules within 18 months of enactment to address the findings of the study.
- (d) This section clarifies that the SEC may issue rules to regulate PFOF before the completion of its study if in the public interest or for the protection of investors.

Appendix H: Section by Section for ANS to H.R. 4618, "the Short Sale Transparency and Market Fairness Act" (Waters)

Section 1. Short title.

- This section establishes the short title of the bill as the "Short Sale Transparency and Market Fairness Act".

Section 2. Section 13(f) Reporting Requirements.

- This section amends section 13(f) the Securities Exchange Act of 1934 by authorizing the SEC to revise13(f) reports filed by companies with a value of at least $100 million to be filed monthly. This section requires such companies to report holdings of certain equity securities and derivatives.

Section 3. Regulations Relating to Short Sale Disclosures.

- This section directs the SEC to implement section 929X of the title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 180 days to require aggregate short sale disclosures to be included in a company's 13F filing.

Section 4. Study on Confidential Treatment of 13(f) Reports.

- This section directs the SEC to conduct a study regarding the standards and criteria to determine how confidential treatment of the 13(f) report should apply. The SEC must submit a report to the Committee on Financial Services of the House of Representations and the Committee on Banking, Housing, and Urban Affairs of the Senate within a year of the bill's enactment. The SEC must complete rulemaking to revise its rules related to confidential treatment of the report within 2 years of enactment.

Appendix I: Section by Section for ANS to H.R. 4619, to amend the Securities Exchange Act of 1934 to prohibit trading ahead by market makers, and for other purposes" (Green)

Section 1. Prohibition on Trading Ahead by Market Makers

- (a) This subsection amends section 15 of the Securities Exchange Act of 1934 to statutorily prohibit market makers from "trading ahead" or engaging in insider trading; requires the CEO of each market maker to annually certify that the CEO has performed reasonable due diligence during the reporting period to ensure the market maker has not traded ahead or misused information it has gleaned when executing an order for a customer; and imposes personal liability on the market maker's CEO and Directors of the Board if the market maker trades ahead. The SEC is also directed to issue rules implementing the provisions of the bill within 90 days of enactment, and may provide exemptions that promote market integrity and are necessary or appropriate in the public interest or for the protection of investors.
- (b) This subsection provides the sense of Congress that nothing in the bill replaces existing rules and regulations.
- (c) The effective date of the bill is 180 days after enactment.

Appendix J: Section by Section for ANS to H.R. 4620, "to amend the Investment Advisers Act of 1940 to limit the exemption provided for family offices from the definition of an investment adviser to those family offices with less than $750,000,000 in assets under management and for other purposes" (Ocasio-Cortez)

Section 1. Family Office Size Limitation

- This section amends section 202(a) of the Investment Advisers Act of 1940 to limit the exemption from registration of family offices to "covered family offices," which are defined to be "any family office with less than $750 million in assets under management." The SEC is required to issue rules to further define covered family offices to exclude persons subject to a final order for conduct constituting fraud, manipulation, or deceit from being associated with a family office. The SEC may exclude family offices with less than $750 million in assets under management from the definition of covered family office if they are highly leveraged or engage in high risk activities.
- The section also amends section 203 of the Advisers Act to require the SEC to provide an exemption for family offices that are not covered family offices from registration, but require them to maintain records and provide reports to the SEC.
- This section repeals section 409 of the Dodd Frank Wall Street Reform and Consumer Protection Act, which excluded certain family offices that have clients that are not members of the family from registration as investment advisers.

Appendix K: Section by Section for ANS to H.R. 4685, "to require the Government Accountability Office to carry out a study on the impact of the gamification of online trading platforms, and for other purposes" (Casten)

Section 1. GAO Study on the Gamification of Investing.

- (a) This section directs the GAO to conduct a study on numerous positive and negative aspects of gamifications, psychological nudges, and other design techniques used by brokers, investment-advisers,"robo-adviser" or financial planners through their online platforms to affect the behavior of investors.
- (b) The SEC Investor Advocate is authorized to conduct investor testing as part of the GAO study.
- (c) GAO is required to complete the study and report it to Congress, the SEC and the SEC's Investor Advocate within 270 days of enactment.
- (d) In conducting the study, GAO will be required to consult various regulators and entities, including the Securities and Exchange Commission.
- (e) This subsection provides a definition of gamification.