

MINORITY VIEWS ON HR 2356

HR 2356 would provide a safe harbor from certain investor liability for broker-dealers to distribute research related to Exchange Traded Funds (ETFs) and other similar products. While the goal of providing retail investors with additional important information deserves merit, the bill as it stands does not appear necessary to achieve this goal nor does it address concerns raised by SEC and FINRA staff.

Today, several broker-dealers provide ETF research to retail investors, notwithstanding this threat of liability from the purchasers of ETFs, which only arises when the report contains material misstatements or omissions. It is not clear that any broker-dealers have ever been sued by investors or been subject to an enforcement action by the SEC or FINRA related to their ETF research reports.

In addition, there are several concerns with the bill, echoed by staffs of the SEC and FINRA, which have not yet been addressed. Specifically, those concerns include: the overly broad definition of research reports; the lack of clarity about whether important FINRA content regulations would apply to ETF research reports, as they apply to other research reports; the permanent ban on requiring any ETF research reports to be filed with FINRA, regardless of future abuses; the constraint on the SEC and FINRA's ability to enforce the antimanipulation and antifraud provisions of the securities laws; the fact that the bill may permit brokers to offer ETFs comprised of commodities and derivatives, as well as, registered investment companies and business development companies (BDCs); and the broad interim safe harbor that fails to protect investors and goes into effect before the SEC has enough time to finalize its rulemaking.

An amendment was offered to address these concerns, but was withdrawn during the markup as the bill's sponsors pledged to continue working to modify the language before the bill moves to the House floor. We look forward to working with the sponsor of the bill to address these concerns.

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