

Memorandum

TO: Members, Committee on Small Business
 FROM: Small Business Committee Staff
 DATE: March 13, 2018
 RE: Markup: H.R. 4743, H.R. 5178; H.R. 3170, H.R. 4668, H.R. 2665, H.R. 5236

Purpose of March 14, 2018 Markup

On Wednesday, March 14, 2018, at 11:00 a.m. in Room 2360 of the Rayburn House Office Building, the Committee on Small Business will mark up five bills to reauthorize and improve programs operated under the Small Business Act and the Small Business Investment Act.

1. H.R. 4743, “Small Business 7(a) Lending Oversight Reform Act of 2018” (Chabot-Velázquez)

What it does: In an effort to ensure the integrity of the 7(a) Loan Program for small businesses, Chairman Chabot and Ranking Member introduced H.R. 4743, with the aim of increasing SBA’s oversight functions while providing stability to small businesses. H.R. 4743 increases oversight by:

- Bolstering SBA’s Office of Credit Risk Management (ORCM) by codifying the responsibilities of the office and the requirements of its director; enhancing the lender oversight review process; increasing the office’s enforcement penalty options; requiring SBA to detail its oversight budget in a transparent manner and to perform a full risk analysis of the program. Additionally, the Lender Oversight Committee, which provides checks and balances to ORCM, is also codified, including its responsibilities and membership.
- Strengthening and updating SBA’s Credit Elsewhere Test, the bedrock of the program, by clarifying commonly used factors in the process and refocusing the test on the borrower’s creditworthiness.

History of the Bill: This bill concept first originated in the Senate during the 114th Congress. After three hearings (March 3, 2017 Subcommittee hearing, May 17, 2017 Full Committee hearing) and countless meetings, Chairman Chabot and Ranking Member Velázquez introduced H.R. 4743 on January 9, 2018. Additionally, on January 17, 2018 the Full Committee held a legislative hearing on this bill.

Amendments:

Chabot 1 v. 1:

This amendment includes numerous technical changes, along with updated language to ensure SBA implementation. Within the Portfolio Risk Analysis report, updates are proposed to the data requirements to ensure accurate statistics are captured. Additionally, revisions are proposed to the Lender Oversight Committee’s membership requirements. A date requirement change is

also proposed within Section 5. The amendment concludes with a proposed update to language contained in Section 6 that pertains to waivers. The new language requires SBA to establish a process for waiving regulations, Standard Operating Procedures, and policy notices.

2. H.R. 5178, the “Puerto Rico Small Business Contracting Assistance Act of 2018” (Velázquez):

What it does: H.R. 5178 assists Puerto Rican small businesses in securing opportunities in the federal marketplace. The bill contains four separate provisions:

- Grants agencies the ability to double the dollar value of prime contracts awarded to Puerto Rico small businesses for the purposes of meeting the agency’s small business prime contracting goal for a duration of four years following enactment. A reporting requirement is in place to track the number and true dollar value of contracts awarded to Puerto Rico small businesses.
- Allows the federal government to transfer surplus property to Puerto Rico small businesses for the duration of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) Control Board.
- Directs the SBA to develop incentives for mentors to choose Puerto Rico small businesses as protégés, and to award subcontracts to these protégés by granting credit towards past performance ratings for mentors that subcontract with Puerto Rico protégés, and to count costs spent training Puerto Rico protégés towards the mentors subcontracting goals.
- Limits a mentor to only two total Puerto Rico protégés, but allows these two to be additional to the three-protégé limit imposed in statute (for up to a total of 5 protégés).

All provisions in this bill are subject to the existence of the PROMESA Control Board and expire when the Board terminates. Only the first provision has a specific sunset date of 4 years following enactment.

History of the Bill: The basis of this bill comes from H.R. 2488, introduced by Ranking Member Velázquez, which contains lending, entrepreneurial development, and contracting provisions. H.R. 2488 received bipartisan support and has 39 cosponsors. However, this Committee identified concerns with the broader bill. A bipartisan effort was undertaken to modify and separate the contracting provisions from the broader bill. H.R. 5178 is the result of those efforts, concerning only the contracting provisions, modified appropriately to help spur small business job growth in the Commonwealth.

Amendments: None are anticipated.

3. H.R. 3170, “Small Business Development Center Cyber Training Act of 2017” (Chabot-Evans)

What it does: The Small Business Cyber Training Act of 2017 would help SBDC staff become better trained to assist small businesses with their cyber security and cyber strategy needs. Specifically, it would establish a cyber counseling certification program in lead SBDCs to better guide small businesses with planning and implementing cybersecurity measures to defend

against cyber attacks. The SBA would be authorized to reimburse SBDCs for employee certification costs up to \$350,000 per fiscal year. This bill amends section 21 of the Small Business Act and utilizes existing federal resources to cover the reimbursement costs.

History of the Bill: This bill concept first originated as a collaboration between the House Small Business Committee and the Senate Small Business Committee. Senate Small Business and Entrepreneurship Chairman Risch introduced S.1428 in June 2017 and the House companion version was introduced in July of 2017.

Amendments: None are anticipated.

4. H.R. 4668, “Small Business Advanced Cybersecurity Enhancements Act of 2017” (Chabot-Velázquez)

What it does: This bill encourages small businesses to work with the federal government, to share cyber security information by providing them additional resources. In order to combat small businesses’ reluctance to engage with the federal government, this legislation encourages their collaboration in the following ways:

- Establishes Small Business Development Centers (SBDCs) as the primary interface for federal cyber security information sharing by small businesses.
- Ensures small businesses that share cyber indicators through SBDCs receive the same protections and exemptions provided in the Cybersecurity Information Sharing Act of 2015.
- Ensures that any policies or rulemaking adopted by any federal agency as a result of small business cyber information sharing does not unfairly burden small businesses.
- Expands liability protections for small businesses that engage with the federal government in good faith.

History of the Bill: This bill concept first originated in the Small Business Committee as a result of numerous Congressional hearings throughout the 115th Congress.

Amendments:

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This amendment is a “Pay for” provision that includes a technical change to Section 4 - Prohibition on New Appropriations. It requires the Administration to receive not less than \$1,000,000 in each fiscal year to develop the cybersecurity assistance units. This funding will come from the Portable Assistance Grant Program. This amendment comes at the behest of Senate staff to ensure harmony between the bicameral versions of this legislation.

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There is concern that H.R. 4668 could have legal liability implications for midsize and large businesses. For instance, if the legislation is enacted in its current form (which affords enhanced liability protection only for small businesses) trial lawyers could argue that the proposed

protections create a negative implication that Congress intended for lawsuits to be brought against larger businesses that did not receive the enhanced protections.

Section 106(c) of the Cybersecurity Information Sharing Act (CISA) says that nothing in Title I of the Cybersecurity Act of 2015 (P.L. 114–113), or CISA, creates a duty to share cyber threat information or a duty to warn or act based on receiving cyber threat information. However, the joint explanatory statement to CISA says that nothing in Title I broadens, narrows, or otherwise affects any existing duties that might be imposed by other law. Title I also does not limit any common law or statutory defenses.

As an example, cyber threat information or a defensive measure that, in hindsight, could have prevented damage to a third party (e.g., a customer) stemming from a cyber incident was shared with a network provider but not necessarily acted on. The concern is that a lawsuit could be brought against a large service provider, arguing that this company failed to warn the third party or take steps to mitigate harm when it was in receipt of cyber threat data.

The language in H.R. 4668, as introduced, could impact the ability of a large entity to argue that Congress did not need to expressly exempt firms in CISA for a failure to act because section 108(i) states that there is no liability for nonparticipation in the sharing activities permitted under CISA. Congress made it clear that CISA was designed to be voluntary, and this policy was reinforced through section 108(i). This amendment is meant to reinforce these points.

5. H.R. 2655, “Small Business Innovation Protection Act of 2017” (Evans-Fitzpatrick)

What it Does: When it comes to intellectual property, small businesses are at a particular disadvantage because they lack the knowledge, expertise, or resources necessary to prevent the theft of their ideas and products. A 2012 joint report released by the Small Business Administration (SBA) and the United States Patent and Trademark Office (USPTO) found that many small businesses may benefit from extending patent rights outside the United States, but few were aware of the necessity or the mechanisms available to accurately and effectively pursue an international patent. This legislation would provide training by both the SBA and the USPTO for small businesses to learn about intellectual property to protect themselves from both domestic and international harm. By leveraging existing intellectual property education and training programs, small businesses will have the network of small business development centers through the SBA and the critical programming at the USPTO available to start and grow their businesses.

History of the Bill: This is an original bill with no previous incarnations. It was introduced on 5/25/2017 and bipartisan cosponsors from the Committee on Small Business. A previous Senate version received support last Congress. This bill is also being considered by the House Judiciary Committee. The Senate counterpart bill, S. 791, is expected to be marked up in the Senate Committee on Small Business and Entrepreneurship on Wednesday.

Amendments: None are anticipated.

6. H.R. 5236, “Main Street Employee Ownership Act of 2018” (Velázquez)

What it does: Access to capital continues to present hurdles for small businesses of all types, including employee stock ownership plans (ESOPs) or worker cooperatives that are 100 percent employee-owned. Unfortunately, SBA guidance presents additional hurdles for these small businesses that often have strategic buy-in from each employee.

To address the uneven treatment of ESOPs and cooperatives by SBA, H.R. 5236 aims to provide clarity and a comprehensive outreach plans to ensure the continued success of employee-owned firms. Specifically, H.R. 5236 proposes the following:

- Provides ESOPs with back-to-back loan ability, which aligns with commercial banking rules
- Outlines ownership transition guidelines to ensure greater success during a changeover
- Creates employee-owned business outreach plans for the Small Business Investment Company program, the Microloan program, and for the Small Business Development Centers program
- Introduces an interagency working group for groups to share best practices
- Updates reporting statistics to capture accurate data, along with a measure to evaluate SBA’s current utilization of employee-owned business loans

History of the Bill: This is an original bill with no previous incarnations. This bill combines 7(a) topics with ESOP topics. Separately, these issues have been explored in previous Small Business Committee hearings.

Amendments:

Chabot 1 v. 1:

This amendment provides technical updates, along with important changes to how the bill treats personal guarantees, which is a foundation of the 7(a) loan program. Beyond the technical changes, the underlying bill includes a provision which provides the SBA Administrator with the authority to waive the personal guarantee for cooperatives. This amendment strikes this provision and preserves the importance of the personal guarantee. To further study how the personal guarantee produces problems for cooperatives, the amendment requires SBA to coordinate next steps on how to address the disparities for cooperatives versus traditionally-structured businesses. Additionally, this amendment reduces the outreach burden on SBA partners by amending the underlying language from “establish an outreach program” to “establish outreach and education material.”