H. R. 3606

To increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 8, 2011

Mr. FINCHER (for himself, Mr. CARNEY, Mr. BACHUS, Mr. CROWLEY, Mr. GARRETT, Mr. McHENRY, Mr. SCHWEIKERT, Mr. WESTMORELAND, Mr. GARAMENDI, Mr. RENACCI, Mr. HUIZENGA of Michigan, Mr. KIND, Mrs. BLACKBURN, Mr. DESJARLAIS, Mr. TIPTON, Mr. POLIS, Mr. CRAWFORD, Mr. GRIFFIN of Arkansas, Mr. AUSTIN SCOTT of Georgia, Mr. PERLMUTTER, Mr. HIMES, Mrs. McCARTHY of New York, Mr. CONNOLLY of Virginia, Mr. PETERS, Mr. GRIMM, Mrs. CAPITO, Mr. HENSARLING, and Ms. ESHOO) introduced the following bill; which was referred to the Committee on Financial Services

A BILL

To increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies.

1 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

2 SECTION 1. SHORT TITLE.

3 This Act may be cited as the “Reopening American Capital Markets to Emerging Growth Companies Act of 2011”.

SEC. 2. DEFINITIONS.

(a) Securities Act of 1933.—Section 2(a) of the Securities Act of 1933 (15 U.S.C. 77b(a)) is amended by adding at the end the following:

“(19) The term ‘emerging growth company’ means an issuer that had total annual gross revenues of less than $1,000,000,000 during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of—

“(A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of $1,000,000,000 or more;

“(B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under this title; and

“(C) the date on which such issuer is deemed to be a ‘large accelerated filer’, as defined in section 240.12b–2 of title 17 of the Code of Federal Regulations, or any successor thereto.”.

(1) by redesignating paragraph (77), as added by section 941(a) of the Investor Protection and Securities Reform Act of 2010 (Public Law 111–203, 124 Stat. 1890), as paragraph (79); and

(2) by adding at the end the following:

“(80) The term ‘emerging growth company’ means an issuer that had total annual gross revenues of less than $1,000,000,000 during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of—

“(A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of $1,000,000,000 or more;

“(B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933; and
“(C) the date on which such issuer is deemed to be a ‘large accelerated filer’, as defined in section 240.12b–2 of title 17 of the Code of Federal Regulations, or any successor thereto.”.

(c) Other Definitions.—As used in this title, the following definitions shall apply:

(1) Commission.—The term “Commission” means the Securities and Exchange Commission.

(2) Initial Public Offering Date.—The term “initial public offering date” means the date of the first sale of common equity securities of an issuer pursuant to an effective registration statement under the Securities Act of 1933.

Sec. 3. Disclosure Obligations.

(a) Executive Compensation.—

(1) Exemption.—Section 14A(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78n–1(e)) is amended—

(A) by inserting “An emerging growth company shall be exempt from the requirements of subsections (a) and (b).” before “The Commission may”; and

(B) by striking “an issuer” and inserting “any other issuer”.

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(2) Proxies.—Section 14(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(i)) is amended by inserting “, for any issuer other than an emerging growth company,” after “including”.

(3) Compensation disclosures.—Section 953(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Public Law 111–203; 124 Stat. 1904) is amended by inserting “, other than an emerging growth company, as that term is defined in section 3(a) of the Securities Exchange Act of 1934,” after “require each issuer”.

(b) Financial disclosures.—

(1) Securities Act of 1933.—Section 7(a) of the Securities Act of 1933 (15 U.S.C. 77g(a)) is amended by adding at the end the following: “An emerging growth company need not present more than 2 years of audited financial statements in order for the registration statement of such emerging growth company with respect to an initial public offering of its common equity securities to be effective, and in any other registration statement to be filed with the Commission, an emerging growth company need not present financial data for any period prior to the earliest audited period presented in connection with its initial public offering.”.
(2) Securities Exchange Act of 1934.—Section 13(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a)) is amended by adding at the end the following: “In any registration statement, periodic report, or other reports to be filed with the Commission, an emerging growth company need not present financial data for any period prior to the earliest audited period presented in connection with its initial public offering.”.

(c) New Accounting Pronouncements.—Section 19(b)(1)(A) of the Securities Act of 1933 (15 U.S.C. 77s(b)(1)(A)) is amended—

(1) in clause (iv), by striking “and” at the end; and

(2) by adding at the end the following:

“(vi) has not established any accounting principles that would require an emerging growth company to comply with any new or revised financial accounting standard as of an effective date that is earlier than the effective date that applies to a company that is not an issuer, as defined in section 2(a)(7) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201(a)(7)); and’’. 
(d) OTHER DISCLOSURES.—An emerging growth company may comply with section 229.303(a) of title 17 of the Code of Federal Regulations, or any successor thereto, by providing information required by such section with respect to the financial statements of the emerging growth company for each period presented pursuant to subsection (b). An emerging growth company may comply with section 229.402 of title 17 of the Code of Federal Regulations, or any successor thereto, by disclosing the same information as any issuer with a market value of outstanding voting and nonvoting common equity held by non-affiliates of less than $75,000,000.

SEC. 4. INTERNAL CONTROLS AUDIT.

Section 404(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7262(b)) is amended by inserting “, other than an issuer that is an emerging growth company (as defined in section 3 of the Securities Exchange Act of 1934),” before “shall attest to”.

SEC. 5. AUDITING STANDARDS.

Section 103(a)(3) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7213(a)(3)) is amended by adding at the end the following:

“(C) TRANSITION PERIOD FOR EMERGING GROWTH COMPANIES.—Any rules of the Board requiring mandatory audit firm rotation or a
supplement to the auditor’s report in which the
auditor would be required to provide additional
information about the audit and the financial
statements of the issuer (auditor discussion and
analysis) shall not apply to an emerging growth
company, as defined in section 3 of the Securi-
ties Exchange Act of 1934. Any additional rules
adopted by the Board after the date of enact-
ment of this subparagraph shall not apply to
any emerging growth company, unless the Com-
mission determines that the application of such
additional requirements to emerging growth
companies is necessary or appropriate in the
public interest, after considering the protection
of investors and whether the action will promote
efficiency, competition, and capital formation.”

SEC. 6. AVAILABILITY OF INFORMATION ABOUT EMERGING
GROWTH COMPANIES.

(a) Provision of Research.—Section 2(a)(3) of
the Securities Act of 1933 (15 U.S.C. 77b(a)(3)) is
amended by adding at the end the following: “The publica-
tion or distribution by a broker or dealer of a research
report about an emerging growth company that is the sub-
ject of a proposed public offering of the common equity
securities of such emerging growth company pursuant to
a registration statement that the issuer proposes to file, or has filed, or that is effective shall be deemed for purposes of paragraph (10) of this subsection and section 5(c) not to constitute an offer for sale or offer to sell a security, even if the broker or dealer is participating or will participate in the registered offering of the securities of the issuer. As used in this paragraph, the term “research report” means a written, electronic, or oral communication that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.”.

(b) Securities Analyst Communications.—Section 15D of the Securities Exchange Act of 1934 (15 U.S.C. 78o–6) is amended—

(1) by redesignating subsection (c) as subsection (d); and

(2) by inserting after subsection (b) the following:

“(c) LIMITATION.—Notwithstanding subsection (a) or any other provision of law, neither the Commission nor any national securities association registered under section 15A may adopt or maintain any rule or regulation in con-
nection with an initial public offering of the common equity of an emerging growth company—

“(1) restricting, based on functional role, which associated persons of a broker, dealer, or member of a national securities association, may arrange for communications between a securities analyst and a potential investor; or

“(2) restricting a securities analyst from participating in any communications with the management of an emerging growth company that is also attended by any other associated person of a broker, dealer, or member of a national securities association whose functional role is other than as a securities analyst.”.

(c) Expanding Permissible Communications.—Section 5 of the Securities Exchange Act of 1933 (15 U.S.C. 77e) is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

“(d) Limitation.—Notwithstanding any other provision of this section, an emerging growth company or any person authorized to act on behalf of an emerging growth company may engage in oral or written communications
with potential investors that are qualified institutional
buyers or institutions that are accredited investors, as
such terms are respectively defined in section 230.144A
and section 230.501(a) of title 17 of the Code of Federal
Regulations, or any successor thereto, to determine wheth-
er such investors might have an interest in a contemplated
securities offering, either prior to or following the date of
filing of a registration statement with respect to such se-
curities with the Commission, subject to the requirement
of subsection (b)(2).”.

(d) POST OFFERING COMMUNICATIONS.—Neither
the Commission nor any national securities association
registered under section 15A of the Securities Exchange
Act of 1934 may adopt or maintain any rule or regulation
prohibiting any broker, dealer, or member of a national
securities association from publishing or distributing any
research report or making a public appearance, with re-
spect to the securities of an emerging growth company,
either—

(1) within any prescribed period of time fol-
lowing the initial public offering date of the emerg-
ing growth company; or

(2) within any prescribed period of time prior
to the expiration date of any agreement between the
broker, dealer, or member of a national securities as-
sociation and the emerging growth company or its 
shareholders that restricts or prohibits the sale of 
securities held by the emerging growth company or 
its shareholders after the initial public offering date.

SEC. 7. OTHER MATTERS.

Section 6 of the Securities Act of 1933 (15 U.S.C. 
77f) is amended by adding at the end the following:

“(e) EMERGING GROWTH COMPANIES.—

“(1) IN GENERAL.—Any emerging growth comp-
any, prior to its initial public offering date, may 
confidentially submit to the Commission a draft reg-
istration statement, for confidential nonpublic review 
by the staff of the Commission prior to public filing, 
provided that the initial confidential submission and 
all amendments thereto shall be publicly filed with 
the Commission not later than 21 days before the 
date on which the issuer conducts a road show, as 
such term is defined in section 230.433(h)(4) of title 
17 of the Code of Federal Regulations, or any suc-
cessor thereto.

“(2) CONFIDENTIALITY.—Notwithstanding any 
other provision of this title, the Commission shall 
not be compelled to disclose any information pro-
vided to or obtained by the Commission pursuant to 
this subsection. For purposes of section 552 of title
5, United States Code, this subsection shall be con-
sidered a statute described in subsection (b)(3)(B) 
of such section 552. Information described in or ob-
tained pursuant to this subsection shall be deemed 
to constitute confidential information for purposes of 
section 24(b)(2) of the Securities Exchange Act of 
1934.”.