112TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
112–143

SMALL BUSINESS CAPITAL ACCESS AND JOB PRESERVATION ACT

JULY 12, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BACHUS, from the Committee on Financial Services, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 1082]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 1082) to amend the Investment Advisers Act of 1940 to provide a registration exemption for private equity fund advisers, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Small Business Capital Access and Job Preservation Act".

SEC. 2. REGISTRATION AND REPORTING EXEMPTIONS RELATING TO PRIVATE EQUITY FUNDS ADVISORS.

Section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3) is amended by adding at the end the following:

"(o) EXEMPTION OF AND REPORTING REQUIREMENTS BY PRIVATE EQUITY FUNDS ADVISORS.—

"(1) IN GENERAL.—Except as provided in this subsection, no investment adviser shall be subject to the registration or reporting requirements of this title with respect to the provision of investment advice relating to a private equity fund or funds, provided that each such fund has not borrowed and does not have outstanding a principal amount in excess of twice its invested capital commitments.

"(2) MAINTENANCE OF RECORDS AND ACCESS BY COMMISSION.—Not later than 6 months after the date of enactment of this subsection, the Commission shall issue final rules—

"(A) to require investment advisers described in paragraph (1) to maintain such records and provide to the Commission such annual or other reports as the Commission taking into account fund size, governance, investment strategy, risk, and other factors, as the Commission determines necessary and appropriate in the public interest and for the protection of investors; and

"(B) to define the term 'private equity fund' for purposes of this subsection.".

PURPOSE AND SUMMARY

Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) (Public Law 111–203) requires most advisers to private investment funds—including advisers to private equity funds—to register with the U.S. Securities and Exchange Commission (SEC). Private equity funds, however, neither caused nor contributed to the financial crisis, and requiring advisers to these funds to register with the SEC—at an estimated cost of $500,000 per fund—needlessly diverts capital, time, and effort from investment activities that could be creating jobs; rather than using these resources to create jobs, private equity funds will use them to comply with these new regulatory mandates that impose costs without reducing systemic risk. To eliminate these unnecessary yet costly burdens, H.R. 1082, the Small Business Capital Access and Job Preservation Act, exempts advisers to certain private equity funds from these new registration requirements. More specifically, H.R. 1082 exempts advisers to private equity funds that have not borrowed and that do not have outstanding a principal amount in excess of twice their funded capital commitments.

BACKGROUND AND NEED FOR LEGISLATION

Title IV of the Dodd-Frank Act amended the Investment Advisers Act of 1940 to require advisers to private funds with more than $150 million under management, including private equity funds, to register with the SEC. Private equity, however, was neither a cause nor a contributing factor to the 2008 financial crisis which had its roots in lax mortgage underwriting and government housing mandates. In order to comply with the SEC's registration requirements, advisers to private equity funds will be required to calculate the value and performance of each of their funds on a monthly basis, which will in turn require advisers to private equity funds to calculate the value of each company in which the fund has invested on a monthly basis as well. Such valuations are time consuming and costly, and they divert much-needed capital and effort away from job creation and investment activities. To eliminate this unnecessary burden, Representative Hurt introduced H.R. 1082, the Small Business Capital Access and Job Preservation Act, on March 15, 2011.

On January 26, 2011, the Committee on Financial Services received testimony from Mr. Andrew Bursky, Chairman of Atlas Holdings LLC, on the role that private equity firms have played in preserving existing jobs and creating new ones by providing capital to struggling companies. As of June 30, 2009, companies that received backing from private equity investment funds employed

more than 6 million people. Studies show that the workforces of companies acquired by private equity firms increased by an average annual rate of 5.7 percent, compared to 1.1 percent for all U.S. companies. The Committee also received testimony about the costs of registering with the SEC, which some have estimated to be as high as $500 million industry-wide, and the lack of systematic risk posed by private equity funds. Because of the cost of registration and the lack of systematic risk, Mr. Bursky opined that advisers to private equity funds should be exempt from SEC registration requirements.

The Subcommittee on Capital Markets and Government Sponsored Enterprises held a legislative hearing on H.R. 1082 on March 16, 2011. During that hearing, the Subcommittee received testimony from Ms. Pamela Hendrickson, Chief Operating Officer of The Riverside Company. Ms. Hendrickson supported H.R. 1082 and testified about the costs of registration, the lack of systematic risk posed by private equity funds, and the jobs created by such private equity funds. Ms. Hendrickson explained that private equity funds are not highly interconnected with other financial market participants; thus, the failure of a private equity fund would be highly unlikely to trigger cascading losses that would lead to a financial crisis. Ms. Hendrickson also explained that private equity funds do not pose a systematic risk because they consist of many diversified investments.

H.R. 1082, the Small Business Capital Access and Job Preservation Act, exempts from the new registration requirements mandated by Title IV of the Dodd-Frank Act those advisers to private equity funds that have not borrowed and do not have outstanding a principal amount in excess of twice their funded capital commitments.

HEARINGS

On March 16, 2011, the Subcommittee on Capital Markets and Government Sponsored Enterprises held a hearing entitled "Legislative Proposals to Promote Job Creation, Capital Formation, and Market Certainty," to consider H.R. 1082 and four other bills. The following witnesses testified:

- Mr. Kenneth A. Bertsch, President and CEO, Society of Corporate Secretaries & Governance Professionals
- Mr. Tom Deutsch, Executive Director, American Securitization Forum
- Ms. Pam Hendrickson, Chief Operating Officer, The Riverside Company
- Mr. Damon Silvers, Policy Director and Special Counsel, AFL–CIO
- Mr. David Weild, Senior Advisor, Grant Thornton, LLP
- Mr. Luke Zubrod, Director, Chatham Financial

COMMITTEE CONSIDERATION

The Subcommittee on Capital Markets and Government Sponsored Enterprises met in open session on May 3 and 4, 2011, and ordered H.R. 1082 favorably reported to the full Committee by a vote of 19 yeas to 13 nays (Record vote no. CM–27).

The Committee on Financial Services met in open session on June 22, 2011 and ordered H.R. 1082, as amended, favorably reported to the House by voice vote.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto.

There were no record votes taken on amendments or in connection with ordering H.R. 1082 reported to the House. A motion by Chairman Bachus to report the bill, as amended, to the House with a favorable recommendation was agreed to by voice vote.

During consideration of H.R. 1082, the following amendments and motion were considered by the Committee:

1. An amendment offered by Mr. Himes, no. 1a, to an amendment offered by Mr. Himes, no. 1, to strike the text of the amendment and insert text to limit the exemption to private equity funds with a leverage ratio less than 2:1 was agreed to by voice vote.

2. An amendment offered by Mr. Himes, no. 1, as amended by an amendment offered by Mr. Himes, no. 1a, to limit the exemption to private equity funds with a leverage ratio less that 2:1 was agreed to by voice vote.

3. A motion offered by Mr. Garrett to move the previous question on H.R. 1082, was agreed to by voice vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee has held hearings and made findings that are reflected in this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee establishes the following performance related goals and objectives for this legislation:

The purpose of H.R. 1082, the Small Business Capital Access and Job Preservation Act, is to exempt advisers to private equity funds that have not borrowed and do not have outstanding a principal amount in excess of twice funded capital commitments from their registration requirements as mandated by Title IV of the Dodd-Frank Act. Title IV of the Dodd-Frank Act amended the Investment Advisers Act of 1940 to require advisers to private funds with more than $150 million under management, including private equity funds, to register with the SEC. Requiring advisers to private equity funds to register with the SEC, at an estimated cost of more than $500,000 per fund, needlessly diverts capital, time, and effort from activities that create jobs and imposes unnecessary costs on private equity funds that will not reduce systemic risk.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax ex-

penditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATES

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

JULY 8, 2011.

Hon. SPENCER BACHUS,
Chairman, Committee on Financial Services,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1082, the Small Business Capital Access and Job Preservation Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Dubary Brea and Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 1082—Small Business Capital Access and Job Preservation Act

H.R. 1082 would amend the Investment Advisers Act of 1940 by exempting investment advisors to private equity funds from registering with and reporting to the Securities and Exchange Commission (SEC) for a fund with outstanding debt that is less than twice the amount investors have committed to the fund.

Under current law, investment advisors are exempt from registering and reporting to the SEC if they advise only venture capital funds that meet certain qualifications. The legislation would direct the SEC to define the term private equity and to adopt rules requiring that advisors to private equity funds maintain records and provide any reports that the commission deems necessary after considering fund size, governance, risk, and investment strategy.

Based on information from the SEC, CBO estimates that implementing H.R. 1082 would not have a significant impact on spending subject to appropriation. Enacting H.R. 1082 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 1082 contains no intergovernmental or private-sector mandates as defmed in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contacts for this estimate are Susan Willie and Dubary Brea. This estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of the section 102(b)(3) of the Congressional Accountability Act.

EARMARK IDENTIFICATION

H.R. 1082 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This section provides a short title to the bill of "Small Business Capital Access and Job Preservation Act."

Section 2. Registration and reporting exemptions related to private equity funds advisors

This section amends Section 203 of the Investment Advisers Act of 1940 and exempts advisers to private equity funds that have not borrowed and do not have outstanding a principal amount in excess of twice its funded capital commitments from registration requirements as mandated by Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111–203).

This section also requires the SEC to issue rules to (1) define a private equity fund, (2) to set forth what records that exempt advisers shall be required to maintain, and (3) to determine what reports exempt advisers shall be required to provide to the SEC.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

INVESTMENT ADVISERS ACT OF 1940

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TITLE II—INVESTMENT ADVISERS

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REGISTRATION OF INVESTMENT ADVISERS

SEC. 203. (a) * * *

* * * * * * *

(o) EXEMPTION OF AND REPORTING REQUIREMENTS BY PRIVATE EQUITY FUNDS ADVISORS.—

(1) IN GENERAL.—Except as provided in this subsection, no investment adviser shall be subject to the registration or reporting requirements of this title with respect to the provision of investment advice relating to a private equity fund or funds, provided that each such fund has not borrowed and does not have outstanding a principal amount in excess of twice its invested capital commitments.

(2) MAINTENANCE OF RECORDS AND ACCESS BY COMMISSION.—Not later than 6 months after the date of enactment of this subsection, the Commission shall issue final rules—

(A) to require investment advisers described in paragraph (1) to maintain such records and provide to the Commission such annual or other reports as the Commission taking into account fund size, governance, investment strategy, risk, and other factors, as the Commission determines necessary and appropriate in the public interest and for the protection of investors; and

(B) to define the term "private equity fund" for purposes of this subsection.

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MINORITY VIEWS

The Wall Street Reform Act brought many firms out of the "shadow" financial system and into the daylight by requiring hedge fund and private equity fund advisors with more than $150 million of assets under management to register with the Securities and Exchange Commission (SEC) as investment advisers and provide information about their trades and portfolios. Under the Act, the SEC will share this data with the Financial Stability Oversight Board (FSOC) and will report to Congress annually on how it uses this data for the protection of investors and the preservation of market integrity.

H.R. 1082 would expand the registration exemption to include all private equity fund advisors. The amended bill now limits the exemption to advisors of funds that are levered by less than a 2-to-1 ratio. As a witness at the hearing on this bill noted, however, debt issued by purchased companies is itself an element of risk. Information about these companies is precisely the type of data that should be available to the FSOC to analyze.

We believe that the amendment by Mr. Himes improved the bill by narrowing the exemption, but because the amendment addressed leverage only at the funds themselves and not at the underlying companies, H.R. 1082 would limit the ability of the FSOC to monitor systemic risk in the financial system, and would prevent the SEC from protecting investors in private equity funds.

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