

ACCESS TO CAPITAL FOR JOB CREATORS ACT

OCTOBER 31, 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

[To accompany H.R. 2940]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services to whom was referred the bill (H.R. 2940) to direct the Securities and Exchange Commission to eliminate the prohibition against general solicitation as a requirement for a certain exemption under Regulation D, 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 “Access to Capital for Job Creators Act”.

SEC. 2. MODIFICATION OF EXEMPTION.

(a) REMOVAL OF RESTRICTION.—Section 4(2) of the Securities Act of 1933 (15 U.S.C. 77d(2)) is amended by adding before the period the following: “, whether or not such transactions involve general solicitation or general advertising”.

(b) MODIFICATION OF RULES.—Not later than 90 days after the date of the enactment of this Act, the Securities and Exchange Commission shall revise its rules issued in section 230.506 of title 17, Code of Federal Regulations, to provide that the prohibition against general solicitation or general advertising contained in section 230.502(c) of such title shall not apply to offers and sales of securities made pursuant to section 230.506, provided that all purchasers of the securities are accredited investors. Such rules shall require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission.

PURPOSE AND SUMMARY

H.R. 2940, the “Access to Capital for Job Creators Act,” makes the exemption under the Securities and Exchange Commission’s (SEC) Regulation D Rule 506 available to issuers even if the securities are marketed through a general solicitation or advertising so

long as the purchasers are “accredited investors.” The legislation would allow companies greater access to accredited investors and to new sources of capital to grow and create jobs, without putting less sophisticated investors at risk. To ensure that only accredited investors purchase the securities, H.R. 2940 requires the SEC to write rules on how an issuer would verify that the purchasers of securities are accredited investors.

BACKGROUND AND NEED FOR LEGISLATION

Capital formation is necessary for job creation. Companies obtain capital through borrowing or equity financing. Because banks have tightened their lending standards in the wake of the economic crisis, there is less credit available to fund growth. Accordingly, equity financing, in which investors purchase ownership stakes in a company in exchange for a share of the company’s future profits, is an increasingly essential means of providing small companies with the capital they need to grow and create jobs. Unfortunately, regulations such as the prohibition of general solicitation and advertising in Regulation D Rule 506 offerings inhibit capital formation.

The Securities Act of 1933 requires that any offer to sell securities must either be registered with the SEC or meet an exemption. Regulation D Rule 506 is an exemption that allows companies to raise capital as long as they do not market their securities through general solicitations or advertising. This prohibition on general solicitation and advertising has been interpreted to mean that potential investors must have an existing relationship with the company before they can be notified that unregistered securities are available for purchase. Requiring potential investors to have an existing relationship with the company significantly limits the pool of potential investors and severely hampers the ability of small companies to raise capital and create jobs.

In addition to eliminating the ban on solicitations and advertisements by issuers and broker-dealers, H.R. 2940 will also enable offline and online forums that bring together investors with companies that need funding to play an increasingly important role in facilitating capital investment in small companies. To ensure the continued viability of such forums, it is important that the SEC not treat these forums as broker-dealers simply because they are engaged in bringing investors and issuers together. Rather, the SEC should only treat these forums as broker-dealers if they receive transaction-based fees for their activities.

At a legislative hearing on H.R. 2940 held by the Subcommittee on Capital Markets and Government Sponsored Enterprises on September 21, 2011, Barry Silbert, Chief Executive Officer of SecondMarket, Inc., testified that “the general solicitation prohibition unnecessarily limits the pool of potential investors, thereby restricting companies’ ability to raise capital to fuel growth” and that “if only accredited investors are eligible to purchase unregistered securities, shouldn’t we strive to maximize the pool of accredited investors that have access to the offering?” Mr. Silbert also noted that the SEC and Congress “recognize that sophisticated, accredited individual and institutional investors have greater capacity for risk and do not require the enhanced protections provided to the average retail investor.”

HEARINGS

On September 21, 2011, the Subcommittee on Capital Markets and Government Sponsored Enterprises held a hearing entitled “Legislative Proposals to Facilitate Small Business Capital Formation and Job Creation,” to consider H.R. 2940 and four other bills. The following witnesses testified:

- Ms. Meredith Cross, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission
- Mr. Vincent Molinari, Founder and Chief Executive Officer, GATE Technologies LLC
- Mr. Barry E. Silbert, Founder and Chief Executive Officer, SecondMarket, Inc.
- Mr. Matthew H. Williams, Chairman and President, Gothenburg State Bank, on behalf of the American Bankers Association
- Mr. William D. Waddill, Senior Vice President and Chief Financial Officer, OncoMed Pharmaceuticals, Inc., on behalf of the Biotechnology Industry Organization
- Mr. A. Heath Abshire, Commissioner, Arkansas Securities Department on behalf of the North American Securities Administrators
- Ms. Dana Mauriello, President, ProFounder

COMMITTEE CONSIDERATION

The Subcommittee on Capital Markets and Government Sponsored Enterprises met in open session on October 5, 2011, and ordered H.R. 2940, as amended, favorably reported to the full Committee by voice vote.

The Committee on Financial Services met in open session on October 26, 2011, and ordered H.R. 2940, 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. 2940, as amended, 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.

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 objective of H.R. 2940, the “Access to Capital for Job Creators Act,” is to make the exemption under the SEC’s Regulation D Rule 506 available to issuers even if the securities are marketed through a general solicitation or advertising so long as the pur-

chasers are “accredited investors.” The legislation would allow companies greater access to accredited investors and to new sources of capital to grow and create jobs, without putting less sophisticated investors at 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 expenditures 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:

OCTOBER 31, 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. 2940, the Access to Capital for Job Creators Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 2940—Access to Capital for Job Creators Act

Under current law, securities may be sold through private offerings, that is, sales that are made to a limited number of eligible investors rather than to the general public, without being registered with the Securities and Exchange Commission (SEC). Issuers of securities through such offerings are prohibited from using general solicitation or advertising to market the securities. H.R. 2940 would eliminate that prohibition, allowing an issuer to advertise the availability of a private offering to the general public, and would require issuers to verify that purchasers meet eligibility requirements as defined in the statute.

Based on information from the SEC, CBO estimates that implementing H.R. 2940 would have a negligible effect on SEC’s workload, and any change in agency spending that is subject to appropriation would not be significant. Enacting H.R. 2940 would not af-

fect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 2940 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Susan Willie. This estimate was approved by Theresa Gullo, Deputy 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. 2940 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 by citing it as the "Access to Capital for Job Creators Act."

Section 2. Modification of exemption

This section amends Section 4(2) of the Securities Act of 1933 and requires the Securities and Exchange Commission (SEC) to amend its rules governing Section 4(2) offerings to provide that the prohibition against general solicitation and general advertising does not apply to SEC Regulation D Rule 506 offerings so long as the purchasers of the securities are accredited investors. This section also requires the SEC to write rules on how an issuer would verify that the purchasers of securities are accredited investors.

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):

SECURITIES ACT OF 1933

TITLE I—SHORT TITLE

* * * * *

EXEMPTED TRANSACTIONS

SEC. 4. The provisions of section 5 shall not apply to—

(1) * * *

(2) transactions by an issuer not involving any public offering, *whether or not such transactions involve general solicitation or general advertising.*

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