

112TH CONGRESS
1ST SESSION

S. 1933

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

IN THE SENATE OF THE UNITED STATES

DECEMBER 1, 2011

Mr. SCHUMER (for himself, Mr. TOOMEY, Mr. WARNER, and Mr. CRAPO) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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 Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Reopening American
5 Capital Markets to Emerging Growth Companies Act of
6 2011”.

1 **SEC. 2. DEFINITIONS.**

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

5 “(19) The term ‘emerging growth company’
6 means an issuer that had total annual gross reve-
7 nues of less than \$1,000,000,000 during its most re-
8 cently completed fiscal year. An issuer that is an
9 emerging growth company as of the first day of that
10 fiscal year shall continue to be deemed an emerging
11 growth company until the earliest of—

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

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

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

1 (b) SECURITIES EXCHANGE ACT OF 1934.—Section
2 3(a) of the Securities Exchange Act of 1934 (15 U.S.C.
3 78c(a)) is amended—

4 (1) by redesignating paragraph (77), as added
5 by section 941(a) of the Investor Protection and Se-
6 curities Reform Act of 2010 (Public Law 111–203,
7 124 Stat. 1890), as paragraph (79); and

8 (2) by adding at the end the following:

9 “(80) The term ‘emerging growth company’
10 means an issuer that had total annual gross reve-
11 nues of less than \$1,000,000,000 during its most re-
12 cently completed fiscal year. An issuer that is an
13 emerging growth company as of the first day of that
14 fiscal year shall continue to be deemed an emerging
15 growth company until the earliest of—

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

19 “(B) the last day of the fiscal year of the
20 issuer following the fifth anniversary of the date
21 of the first sale of common equity securities of
22 the issuer pursuant to an effective registration
23 statement under the Securities Act of 1933;
24 and

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

6 (c) OTHER DEFINITIONS.—As used in this title, the
7 following definitions shall apply:

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

10 (2) INITIAL PUBLIC OFFERING DATE.—The
11 term “initial public offering date” means the date of
12 the first sale of common equity securities of an
13 issuer pursuant to an effective registration state-
14 ment under the Securities Act of 1933.

15 **SEC. 3. DISCLOSURE OBLIGATIONS.**

16 (a) EXECUTIVE COMPENSATION.—

17 (1) EXEMPTION.—Section 14A(e) of the Securi-
18 ties Exchange Act of 1934 (15 U.S.C. 78n–1(e)) is
19 amended—

20 (A) by inserting “An emerging growth
21 company shall be exempt from the requirements
22 of subsections (a) and (b).” before “The Com-
23 mission may”; and

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

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

5 (3) COMPENSATION DISCLOSURES.—Section
6 953(b)(1) of the Dodd-Frank Wall Street Reform
7 and Consumer Protection Act of 2010 (Public Law
8 111–203; 124 Stat. 1904) is amended by inserting
9 “, other than an emerging growth company, as that
10 term is defined in section 3(a) of the Securities Ex-
11 change Act of 1934,” after “require each issuer”.

12 (b) FINANCIAL DISCLOSURES.—

13 (1) SECURITIES ACT OF 1933.—Section 7(a) of
14 the Securities Act of 1933 (15 U.S.C. 77g(a)) is
15 amended by adding at the end the following: “An
16 emerging growth company need not present more
17 than 2 years of audited financial statements in order
18 for the registration statement of such emerging
19 growth company with respect to an initial public of-
20 fering of its common equity securities to be effective,
21 and in any other registration statement to be filed
22 with the Commission, an emerging growth company
23 need not present financial data for any period prior
24 to the earliest audited period presented in connection
25 with its initial public offering.”.

1 (2) SECURITIES EXCHANGE ACT OF 1934.—Sec-
2 tion 13(a) of the Securities Exchange Act of 1934
3 (15 U.S.C. 78m(a)) is amended by adding at the
4 end the following: “In any registration statement,
5 periodic report, or other reports to be filed with the
6 Commission, an emerging growth company need not
7 present financial data for any period prior to the
8 earliest audited period presented in connection with
9 its initial public offering.”.

10 (c) NEW ACCOUNTING PRONOUNCEMENTS.—Section
11 19(b)(1)(A) of the Securities Act of 1933 (15 U.S.C.
12 77s(b)(1)(A)) is amended—

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

15 (2) by adding at the end the following:

16 “(vi) has not established any account-
17 ing principles that would require an emerg-
18 ing growth company to comply with any
19 new or revised financial accounting stand-
20 ard as of an effective date that is earlier
21 than the effective date that applies to a
22 company that is not an issuer, as defined
23 in section 2(a)(7) of the Sarbanes-Oxley
24 Act of 2002 (15 U.S.C. 7201(a)(7)); and”.

1 (d) OTHER DISCLOSURES.—An emerging growth
2 company may comply with section 229.303(a) of title 17
3 of the Code of Federal Regulations, or any successor
4 thereto, by providing information required by such section
5 with respect to the financial statements of the emerging
6 growth company for each period presented pursuant to
7 subsection (b). An emerging growth company may comply
8 with section 229.402 of title 17 of the Code of Federal
9 Regulations, or any successor thereto, by disclosing the
10 same information as any issuer with a market value of
11 outstanding voting and nonvoting common equity held by
12 non-affiliates of less than \$75,000,000.

13 **SEC. 4. INTERNAL CONTROLS AUDIT.**

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

19 **SEC. 5. AUDITING STANDARDS.**

20 Section 103(a)(3) of the Sarbanes-Oxley Act of 2002
21 (15 U.S.C. 7213(a)(3)) is amended by adding at the end
22 the following:

23 “(C) TRANSITION PERIOD FOR EMERGING
24 GROWTH COMPANIES.—Any rules of the Board
25 requiring mandatory audit firm rotation or a

1 supplement to the auditor’s report in which the
2 auditor would be required to provide additional
3 information about the audit and the financial
4 statements of the issuer (auditor discussion and
5 analysis) shall not apply to an emerging growth
6 company, as defined in section 3 of the Securi-
7 ties Exchange Act of 1934. Any additional rules
8 adopted by the Board after the date of enact-
9 ment of this subparagraph shall not apply to
10 any emerging growth company, unless the Com-
11 mission determines that the application of such
12 additional requirements to emerging growth
13 companies is necessary or appropriate in the
14 public interest, after considering the protection
15 of investors and whether the action will promote
16 efficiency, competition, and capital formation.”.

17 **SEC. 6. AVAILABILITY OF INFORMATION ABOUT EMERGING**
18 **GROWTH COMPANIES.**

19 (a) PROVISION OF RESEARCH.—Section 2(a)(3) of
20 the Securities Act of 1933 (15 U.S.C. 77b(a)(3)) is
21 amended by adding at the end the following: “The publica-
22 tion or distribution by a broker or dealer of a research
23 report about an emerging growth company that is the sub-
24 ject of a proposed public offering of the common equity
25 securities of such emerging growth company pursuant to

1 a registration statement that the issuer proposes to file,
2 or has filed, or that is effective shall be deemed for pur-
3 poses of paragraph (10) of this subsection and section 5(c)
4 not to constitute an offer for sale or offer to sell a security,
5 even if the broker or dealer is participating or will partici-
6 pate in the registered offering of the securities of the
7 issuer. As used in this paragraph, the term “research re-
8 port” means a written, electronic, or oral communication
9 that includes information, opinions, or recommendations
10 with respect to securities of an issuer or an analysis of
11 a security or an issuer, whether or not it provides informa-
12 tion reasonably sufficient upon which to base an invest-
13 ment decision.”.

14 (b) SECURITIES ANALYST COMMUNICATIONS.—Sec-
15 tion 15D of the Securities Exchange Act of 1934 (15
16 U.S.C. 78o–6) is amended—

17 (1) by redesignating subsection (c) as sub-
18 section (d); and

19 (2) by inserting after subsection (b) the fol-
20 lowing:

21 “(c) LIMITATION.—Notwithstanding subsection (a)
22 or any other provision of law, neither the Commission nor
23 any national securities association registered under section
24 15A may adopt or maintain any rule or regulation in con-

1 nection with an initial public offering of the common eq-
 2 uity of an emerging growth company—

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

8 “(2) restricting a securities analyst from par-
 9 ticipating in any communications with the manage-
 10 ment of an emerging growth company that is also
 11 attended by any other associated person of a broker,
 12 dealer, or member of a national securities associa-
 13 tion whose functional role is other than as a securi-
 14 ties analyst.”.

15 (c) EXPANDING PERMISSIBLE COMMUNICATIONS.—
 16 Section 5 of the Securities Exchange Act of 1933 (15
 17 U.S.C. 77e) is amended—

18 (1) by redesignating subsection (d) as sub-
 19 section (e); and

20 (2) by inserting after subsection (e) the fol-
 21 lowing:

22 “(d) LIMITATION.—Notwithstanding any other provi-
 23 sion of this section, an emerging growth company or any
 24 person authorized to act on behalf of an emerging growth
 25 company may engage in oral or written communications

1 with potential investors that are qualified institutional
2 buyers or institutions that are accredited investors, as
3 such terms are respectively defined in section 230.144A
4 and section 230.501(a) of title 17 of the Code of Federal
5 Regulations, or any successor thereto, to determine wheth-
6 er such investors might have an interest in a contemplated
7 securities offering, either prior to or following the date of
8 filing of a registration statement with respect to such se-
9 curities with the Commission, subject to the requirement
10 of subsection (b)(2).”.

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

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

23 (2) within any prescribed period of time prior
24 to the expiration date of any agreement between the
25 broker, dealer, or member of a national securities as-

1 society and the emerging growth company or its
2 shareholders that restricts or prohibits the sale of
3 securities held by the emerging growth company or
4 its shareholders after the initial public offering date.

5 **SEC. 7. OTHER MATTERS.**

6 Section 6 of the Securities Act of 1933 (15 U.S.C.
7 77f) is amended by adding at the end the following:

8 “(e) EMERGING GROWTH COMPANIES.—

9 “(1) IN GENERAL.—Any emerging growth com-
10 pany, prior to its initial public offering date, may
11 confidentially submit to the Commission a draft reg-
12 istration statement, for confidential nonpublic review
13 by the staff of the Commission prior to public filing,
14 provided that the initial confidential submission and
15 all amendments thereto shall be publicly filed with
16 the Commission not later than 21 days before the
17 date on which the issuer conducts a road show, as
18 such term is defined in section 230.433(h)(4) of title
19 17 of the Code of Federal Regulations, or any suc-
20 cessor thereto.

21 “(2) CONFIDENTIALITY.—Notwithstanding any
22 other provision of this title, the Commission shall
23 not be compelled to disclose any information pro-
24 vided to or obtained by the Commission pursuant to
25 this subsection. For purposes of section 552 of title

1 5, United States Code, this subsection shall be con-
2 sidered a statute described in subsection (b)(3)(B)
3 of such section 552. Information described in or ob-
4 tained pursuant to this subsection shall be deemed
5 to constitute confidential information for purposes of
6 section 24(b)(2) of the Securities Exchange Act of
7 1934.”.

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