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

To increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Reopening American Capital Markets to Emerging Growth Companies Act of 2012”.

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; or
“(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, Code of Federal Regulations, or any successor thereto.”.

(b) **Securities Exchange Act of 1934.**—Section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) is amended—

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

(c) OTHER DEFINITIONS.—As used in this Act, the fol-
owing 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.

(d) EFFECTIVE DATE.—Notwithstanding section
2(a)(19) of the Securities Act of 1933 and section 3(a)(80)
of the Securities Exchange Act of 1934, an issuer shall not
be an emerging growth company for purposes of such Acts
if the first sale of common equity securities of such issuer
pursuant to an effective registration statement under the
Securities Act of 1933 occurred on or before December 8,
2011.
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 striking “The Commission may” and inserting the following:

“(1) IN GENERAL.—The Commission may”;

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

(C) by adding at the end the following:

“(2) TREATMENT OF EMERGING GROWTH COMPANIES.—

“(A) IN GENERAL.—An emerging growth company shall be exempt from the requirements of subsections (a) and (b).

“(B) COMPLIANCE AFTER TERMINATION OF EMERGING GROWTH COMPANY TREATMENT.—An issuer that was an emerging growth company but is no longer an emerging growth company shall include the first separate resolution described under subsection (a)(1) not later than the end of—

“(i) in the case of an issuer that was an emerging growth company for less than 2 years after the date of first sale of com-
mon equity securities of the issuer pursuant
to an effective registration statement under
the Securities Act of 1933, the 3-year period
beginning on such date; and

“(ii) in the case of any other issuer,
the 1-year period beginning on the date the
issuer is no longer an emerging growth com-
pany.”.

(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 Investor Protection and Securities
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 AND ACCOUNTING PRO-
NOUNCEMENTS.—

(1) SECURITIES ACT OF 1933.—Section 7(a) of
the Securities Act of 1933 (15 U.S.C. 77g(a)) is
amended—
(A) by striking “(a) The registration” and inserting the following:

“(a) INFORMATION REQUIRED IN REGISTRATION STATEMENT.—

“(1) IN GENERAL.—The registration”; and

(B) by adding at the end the following:

“(2) TREATMENT OF EMERGING GROWTH COMPANIES.—An emerging growth company—

“(A) 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 selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period presented in connection with its initial public offering; and

“(B) may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 2(a) of the
Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201(a)) is required to comply with such new or revised accounting standard, if such standard applies to companies that are not issuers.”.

(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 selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period presented in connection with its first registration statement that became effective under this Act or the Securities Act of 1933 and, with respect to any such statement or reports, an emerging growth company may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 2(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201(a))) is required to comply with such new or revised accounting standard, if such standard applies to companies that are not issuers.”.
(c) OTHER DISCLOSURES.—An emerging growth company may comply with section 229.303(a) of title 17, 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 section 7(a) of the Securities Act of 1933 (15 U.S.C. 77g(a)). An emerging growth company may comply with section 229.402 of title 17, 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 audit of an emerging growth company, as defined in section 3 of the Securities Exchange Act of 1934. Any additional rules adopted by the Board after the date of enactment of this subparagraph shall not apply to an audit of any emerging growth company, unless the Commission determines that the application of such additional requirements 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 publication or distribution by a broker or dealer of a research report about an emerging growth company that is the subject of a proposed public offering of the common equity securities of such emerging growth company pursuant to a registration state-
ment 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
6) is amended—

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

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

“(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 connec-
tion 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 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 sec-
tion 230.501(a) of title 17, Code of Federal Regulations, or
any successor thereto, to determine whether such investors
might have an interest in a contemplated securities offering,
either prior to or following the date of filing of a registra-
tion statement with respect to such securities with the Com-
mission, subject to the requirement of subsection (b)(2).”.

(d) POST OFFERING COMMUNICATIONS.—Neither the
Commission nor any national securities association reg-
istered under section 15A of the Securities Exchange Act
of 1934 may adopt or maintain any rule or regulation pro-
hibiting any broker, dealer, or member of a national securi-
ties association from publishing or distributing any re-
search report or making a public appearance, with respect
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 emerging
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-
association and the emerging growth company or its
shareholders that restricts or prohibits the sale of se-
curities held by the emerging growth company or its
shareholders after the initial public offering date.
(a) **Draft Registration Statements.**—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 com-
pany, 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, Code of
Federal Regulations, or any successor thereto.

“(2) **Confidentiality.**—Notwithstanding any
other provision of this title, the Commission shall not
be compelled to disclose any information provided to
or obtained by the Commission pursuant to this sub-
section. For purposes of section 552 of title 5, United
States Code, this subsection shall be considered a stat-
ute described in subsection (b)(3)(B) of such section
552. Information described in or obtained pursuant to
this subsection shall be deemed to constitute confiden-
(b) Tick Size.—Section 11A(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78k-1(c)) is amended by adding at the end the following new paragraph:

“(6) Tick size.—

“(A) Study and report.—The Commission shall conduct a study examining the transition to trading and quoting securities in one penny increments, also known as decimalization. The study shall examine the impact that decimalization has had on the number of initial public offerings since its implementation relative to the period before its implementation. The study shall also examine the impact that this change has had on liquidity for small and middle capitalization company securities and whether there is sufficient economic incentive to support trading operations in these securities in penny increments. Not later than 90 days after the date of enactment of this paragraph, the Commission shall submit to Congress a report on the findings of the study.

“(B) Designation.—If the Commission determines that the securities of emerging growth
companies should be quoted and traded using a minimum increment of greater than $0.01, the Commission may, by rule not later than 180 days after the date of enactment of this paragraph, designate a minimum increment for the securities of emerging growth companies that is greater than $0.01 but less than $0.10 for use in all quoting and trading of securities in any exchange or other execution venue.”.

SEC. 8. OPT-IN RIGHT FOR EMERGING GROWTH COMPANIES.

(a) In general.—With respect to an exemption provided to emerging growth companies under this Act, or an amendment made by this Act, an emerging growth company may choose to forgo such exemption and instead comply with the requirements that apply to an issuer that is not an emerging growth company.

(b) Special rule.—Notwithstanding subsection (a), with respect to the extension of time to comply with new or revised financial accounting standards provided under section 7(a)(2)(B) of the Securities Act of 1933 and section 13(a) of the Securities Exchange Act of 1934, as added by section 3(b), if an emerging growth company chooses to comply with such standards to the same extent that a non-
emerging growth company is required to comply with such standards, the emerging growth company—

(1) must make such choice at the time the company is first required to file a registration statement, periodic report, or other report with the Commission under section 13 of the Securities Exchange Act of 1934 and notify the Securities and Exchange Commission of such choice;

(2) may not select some standards to comply with in such manner and not others, but must comply with all such standards to the same extent that a non-emerging growth company is required to comply with such standards; and

(3) must continue to comply with such standards to the same extent that a non-emerging growth company is required to comply with such standards for as long as the company remains an emerging growth company.

SEC. 9. REVIEW OF REGULATION S-K.

(a) REVIEW.—The Securities and Exchange Commission shall conduct a review of its Regulation S-K (17 C.F.R. 229.10 et seq.) to—

(1) comprehensively analyze the current registration requirements of such regulation; and
(2) determine how such requirements can be updated to modernize and simplify the registration process and reduce the costs and other burdens associated with these requirements for issuers who are emerging growth companies.

(b) REPORT.—Not later the 180 days after the date of enactment of this Act, the Commission shall transmit to Congress a report of the review conducted under subsection (a). The report shall include the specific recommendations of the Commission on how to streamline the registration process in order to make it more efficient and less burdensome for the Commission and for prospective issuers who are emerging growth companies.
A BILL

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MARCH 1, 2012

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed.

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