

Union Calendar No. 281

112TH CONGRESS
2^D SESSION

H. R. 3606

[Report No. 112-406]

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

MARCH 1, 2012

Additional sponsors: Mr. DOLD, Ms. HAYWORTH, Mr. ROYCE, Ms. MOORE, Mr. NEUGEBAUER, Mr. OWENS, Mr. MEEHAN, Mr. SAM JOHNSON of Texas, Mr. SESSIONS, Mr. KING of New York, Mr. WELCH, Mr. SMITH of Washington, Ms. SEWELL, Mr. HURT, Mr. WOMACK, Mr. ROSS of Arkansas, Mr. SCOTT of South Carolina, Mr. SCHOCK, Mr. CARNAHAN, Mr. LUETKEMEYER, Mr. RUSH, Mr. GARY G. MILLER of California, Mr. CANSECO, Mr. LARSEN of Washington, Mr. SCHILLING, and Mr. MANZULLO

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

[Strike out all after the enacting clause and insert the part printed in *italic*]

[For text of introduced bill, see copy of bill as introduced on December 8, 2011]

A BILL

To increase American job creation and economic growth by
improving access to the public capital markets for emerg-
ing 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 *2012”.*

7 **SEC. 2. DEFINITIONS.**

8 *(a) SECURITIES ACT OF 1933.—Section 2(a) of the Se-*
9 *curities Act of 1933 (15 U.S.C. 77b(a)) is amended by add-*
10 *ing at the end the following:*

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

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

21 *“(B) the last day of the fiscal year of the*
22 *issuer following the fifth anniversary of the date*
23 *of the first sale of common equity securities of*
24 *the issuer pursuant to an effective registration*
25 *statement under this title; or*

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

5 (b) *SECURITIES EXCHANGE ACT OF 1934*.—Section
6 3(a) of the Securities Exchange Act of 1934 (15 U.S.C.
7 78c(a)) is amended—

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

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

13 “(80) *EMERGING GROWTH COMPANY*.—The term
14 ‘emerging growth company’ means an issuer that had
15 total annual gross revenues of less than
16 \$1,000,000,000 during its most recently completed fis-
17 cal year. An issuer that is an emerging growth com-
18 pany as of the first day of that fiscal year shall con-
19 tinue to be deemed an emerging growth company
20 until the earliest of—

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

24 “(B) the last day of the fiscal year of the
25 issuer following the fifth anniversary of the date

1 *of the first sale of common equity securities of*
2 *the issuer pursuant to an effective registration*
3 *statement under the Securities Act of 1933; or*

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

8 (c) *OTHER DEFINITIONS.—As used in this Act, the fol-*
9 *lowing definitions shall apply:*

10 (1) *COMMISSION.—The term “Commission”*
11 *means the Securities and Exchange Commission.*

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

17 (d) *EFFECTIVE DATE.—Notwithstanding section*
18 *2(a)(19) of the Securities Act of 1933 and section 3(a)(80)*
19 *of the Securities Exchange Act of 1934, an issuer shall not*
20 *be an emerging growth company for purposes of such Acts*
21 *if the first sale of common equity securities of such issuer*
22 *pursuant to an effective registration statement under the*
23 *Securities Act of 1933 occurred on or before December 8,*
24 *2011.*

1 **SEC. 3. DISCLOSURE OBLIGATIONS.**

2 (a) *EXECUTIVE COMPENSATION.*—

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

5
6 (A) *by striking “The Commission may” and*
7 *inserting the following:*

8 “(1) *IN GENERAL.*—*The Commission may*”;

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

11 (C) *by adding at the end the following:*

12 “(2) *TREATMENT OF EMERGING GROWTH COMPANIES.*—

13
14 “(A) *IN GENERAL.*—*An emerging growth*
15 *company shall be exempt from the requirements*
16 *of subsections (a) and (b).*

17 “(B) *COMPLIANCE AFTER TERMINATION OF*
18 *EMERGING GROWTH COMPANY TREATMENT.*—*An*
19 *issuer that was an emerging growth company*
20 *but is no longer an emerging growth company*
21 *shall include the first separate resolution de-*
22 *scribed under subsection (a)(1) not later than the*
23 *end of—*

24 “(i) *in the case of an issuer that was*
25 *an emerging growth company for less than*
26 *2 years after the date of first sale of com-*

1 *mon equity securities of the issuer pursuant*
2 *to an effective registration statement under*
3 *the Securities Act of 1933, the 3-year period*
4 *beginning on such date; and*

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

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

13 (3) *COMPENSATION DISCLOSURES.*—Section
14 *953(b)(1) of the Investor Protection and Securities*
15 *Reform Act of 2010 (Public Law 111–203; 124 Stat.*
16 *1904) is amended by inserting “, other than an*
17 *emerging growth company, as that term is defined in*
18 *section 3(a) of the Securities Exchange Act of 1934,”*
19 *after “require each issuer”.*

20 (b) *FINANCIAL DISCLOSURES AND ACCOUNTING PRO-*
21 *NOUNCEMENTS.*—

22 (1) *SECURITIES ACT OF 1933.*—Section 7(a) of
23 *the Securities Act of 1933 (15 U.S.C. 77g(a)) is*
24 *amended—*

1 (A) by striking “(a) The registration” and
2 inserting the following:

3 “(a) *INFORMATION REQUIRED IN REGISTRATION*
4 *STATEMENT.*—

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

6 (B) by adding at the end the following:

7 “(2) *TREATMENT OF EMERGING GROWTH COMPA-*
8 *NIES.*—*An emerging growth company—*

9 “(A) need not present more than 2 years of
10 *audited financial statements in order for the reg-*
11 *istration statement of such emerging growth*
12 *company with respect to an initial public offer-*
13 *ing of its common equity securities to be effec-*
14 *tive, and in any other registration statement to*
15 *be filed with the Commission, an emerging*
16 *growth company need not present selected finan-*
17 *cial data in accordance with section 229.301 of*
18 *title 17, Code of Federal Regulations, for any pe-*
19 *riod prior to the earliest audited period pre-*
20 *sented in connection with its initial public offer-*
21 *ing; and*

22 “(B) may not be required to comply with
23 *any new or revised financial accounting stand-*
24 *ard until such date that a company that is not*
25 *an issuer (as defined under section 2(a) of the*

1 *Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201(a))*
2 *is required to comply with such new or revised*
3 *accounting standard, if such standard applies to*
4 *companies that are not issuers.”.*

5 (2) *SECURITIES EXCHANGE ACT OF 1934.—Sec-*
6 *tion 13(a) of the Securities Exchange Act of 1934 (15*
7 *U.S.C. 78m(a)) is amended by adding at the end the*
8 *following: “In any registration statement, periodic re-*
9 *port, or other reports to be filed with the Commission,*
10 *an emerging growth company need not present se-*
11 *lected financial data in accordance with section*
12 *229.301 of title 17, Code of Federal Regulations, for*
13 *any period prior to the earliest audited period pre-*
14 *sented in connection with its first registration state-*
15 *ment that became effective under this Act or the Secu-*
16 *rities Act of 1933 and, with respect to any such state-*
17 *ment or reports, an emerging growth company may*
18 *not be required to comply with any new or revised fi-*
19 *nancial accounting standard until such date that a*
20 *company that is not an issuer (as defined under sec-*
21 *tion 2(a) of the Sarbanes-Oxley Act of 2002 (15*
22 *U.S.C. 7201(a))) is required to comply with such new*
23 *or revised accounting standard, if such standard ap-*
24 *plies to companies that are not issuers.”.*

1 (c) *OTHER DISCLOSURES.*—An emerging growth com-
2 pany may comply with section 229.303(a) of title 17, Code
3 of Federal Regulations, or any successor thereto, by pro-
4 viding information required by such section with respect
5 to the financial statements of the emerging growth company
6 for each period presented pursuant to section 7(a) of the
7 Securities Act of 1933 (15 U.S.C. 77g(a)). An emerging
8 growth company may comply with section 229.402 of title
9 17, Code of Federal Regulations, or any successor thereto,
10 by disclosing the same information as any issuer with a
11 market value of outstanding voting and nonvoting common
12 equity held by 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 an
16 issuer that is an emerging growth company (as defined in
17 section 3 of the Securities Exchange Act of 1934),” before
18 “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 audit of an*
6 *emerging growth company, as defined in section*
7 *3 of the Securities Exchange Act of 1934. Any*
8 *additional rules adopted by the Board after the*
9 *date of enactment of this subparagraph shall not*
10 *apply to an audit of any emerging growth com-*
11 *pany, unless the Commission determines that the*
12 *application of such additional requirements is*
13 *necessary or appropriate in the public interest,*
14 *after considering the protection of investors and*
15 *whether the action will promote efficiency, com-*
16 *petition, and capital formation.”.*

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

19 *(a) PROVISION OF RESEARCH.—Section 2(a)(3) of the*
20 *Securities Act of 1933 (15 U.S.C. 77b(a)(3)) is amended*
21 *by adding at the end the following: “The publication or dis-*
22 *tribution by a broker or dealer of a research report about*
23 *an emerging growth company that is the subject of a pro-*
24 *posed public offering of the common equity securities of such*
25 *emerging growth company pursuant to a registration state-*

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

13 *(b) SECURITIES ANALYST COMMUNICATIONS.—Section*
14 *15D of the Securities Exchange Act of 1934 (15 U.S.C. 78o–*
15 *6) is amended—*

16 *(1) by redesignating subsection (c) as subsection*
17 *(d); and*

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

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

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

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

12 (c) *EXPANDING PERMISSIBLE COMMUNICATIONS.*—
13 Section 5 of the Securities Act of 1933 (15 U.S.C. 77e) is
14 amended—

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

17 (2) by inserting after subsection (c) the fol-
18 lowing:

19 “(d) *LIMITATION.*—Notwithstanding any other provi-
20 sion of this section, an emerging growth company or any
21 person authorized to act on behalf of an emerging growth
22 company may engage in oral or written communications
23 with potential investors that are qualified institutional
24 buyers or institutions that are accredited investors, as such
25 terms are respectively defined in section 230.144A and sec-

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

7 *(d) POST OFFERING COMMUNICATIONS.—Neither the*
8 *Commission nor any national securities association reg-*
9 *istered under section 15A of the Securities Exchange Act*
10 *of 1934 may adopt or maintain any rule or regulation pro-*
11 *hibiting any broker, dealer, or member of a national securi-*
12 *ties association from publishing or distributing any re-*
13 *search report or making a public appearance, with respect*
14 *to the securities of an emerging growth company, either—*

15 *(1) within any prescribed period of time fol-*
16 *lowing the initial public offering date of the emerging*
17 *growth company; or*

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

1 **SEC. 7. OTHER MATTERS.**

2 (a) *DRAFT REGISTRATION STATEMENTS.*—Section 6 of
3 *the Securities Act of 1933 (15 U.S.C. 77f) is amended by*
4 *adding at the end the following:*

5 “(e) *EMERGING GROWTH COMPANIES.*—

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

17 “(2) *CONFIDENTIALITY.*—Notwithstanding any
18 *other provision of this title, the Commission shall not*
19 *be compelled to disclose any information provided to*
20 *or obtained by the Commission pursuant to this sub-*
21 *section. For purposes of section 552 of title 5, United*
22 *States Code, this subsection shall be considered a stat-*
23 *ute described in subsection (b)(3)(B) of such section*
24 *552. Information described in or obtained pursuant to*
25 *this subsection shall be deemed to constitute confiden-*

1 *tial information for purposes of section 24(b)(2) of the*
2 *Securities Exchange Act of 1934.”.*

3 (b) *TICK SIZE.*—Section 11A(c) of the Securities Ex-
4 *change Act of 1934 (15 U.S.C. 78k-1(c)) is amended by add-*
5 *ing at the end the following new paragraph:*

6 “(6) *TICK SIZE.*—

7 “(A) *STUDY AND REPORT.*—The Commis-
8 *sion shall conduct a study examining the transi-*
9 *tion to trading and quoting securities in one*
10 *penny increments, also known as decimalization.*
11 *The study shall examine the impact that*
12 *decimalization has had on the number of initial*
13 *public offerings since its implementation relative*
14 *to the period before its implementation. The*
15 *study shall also examine the impact that this*
16 *change has had on liquidity for small and mid-*
17 *dle capitalization company securities and wheth-*
18 *er there is sufficient economic incentive to sup-*
19 *port trading operations in these securities in*
20 *penny increments. Not later than 90 days after*
21 *the date of enactment of this paragraph, the*
22 *Commission shall submit to Congress a report on*
23 *the findings of the study.*

24 “(B) *DESIGNATION.*—If the Commission de-
25 *termines that the securities of emerging growth*

1 *emerging growth company is required to comply with such*
2 *standards, the emerging growth company—*

3 *(1) must make such choice at the time the com-*
4 *pany is first required to file a registration statement,*
5 *periodic report, or other report with the Commission*
6 *under section 13 of the Securities Exchange Act of*
7 *1934 and notify the Securities and Exchange Com-*
8 *mission of such choice;*

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

14 *(3) must continue to comply with such standards*
15 *to the same extent that a non-emerging growth com-*
16 *pany is required to comply with such standards for*
17 *as long as the company remains an emerging growth*
18 *company.*

19 **SEC. 9. REVIEW OF REGULATION S-K.**

20 *(a) REVIEW.—The Securities and Exchange Commis-*
21 *sion shall conduct a review of its Regulation S-K (17 C.F.R.*
22 *229.10 et seq.) to—*

23 *(1) comprehensively analyze the current registra-*
24 *tion requirements of such regulation; and*

1 (2) *determine how such requirements can be up-*
2 *dated to modernize and simplify the registration*
3 *process and reduce the costs and other burdens associ-*
4 *ated with these requirements for issuers who are*
5 *emerging growth companies.*

6 (b) *REPORT.—Not later the 180 days after the date*
7 *of enactment of this Act, the Commission shall transmit to*
8 *Congress a report of the review conducted under subsection*
9 *(a). The report shall include the specific recommendations*
10 *of the Commission on how to streamline the registration*
11 *process in order to make it more efficient and less burden-*
12 *some for the Commission and for prospective issuers who*
13 *are emerging growth companies.*

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