

WSGR ALERT

DECEMBER 2011

RECENTLY PROPOSED LEGISLATION ADOPTS IPO TASK FORCE RECOMMENDATIONS

On December 1, 2011, Senators Charles Schumer and Pat Toomey introduced a bill designed to improve emerging-growth companies' access to public capital markets. The bill, known as the "Reopening American Capital Markets to Emerging Growth Companies Act,"¹ tracks many of the recommendations made by the IPO Task Force²—a working group of venture capitalists, CEOs, public investors, securities lawyers, academics, and investment bankers—in its presentation to the U.S. Department of the Treasury. Wilson Sonsini Goodrich & Rosati's CEO, Steve Bochner, was a member of the IPO Task Force.

The bill would create a new category of issuer, defined as an "emerging growth company" that has less than \$1 billion in annual revenues at the time it registers with the SEC. The proposed bill provides a transitional "on-ramp" for these emerging-growth companies by building on existing scaled disclosure rules, easing disproportionate compliance burdens, and increasing investors' visibility into emerging-growth companies. As currently constituted, the bill would do this by:

- requiring only two years of audited financial statements in the registration statement of an emerging-growth company, and allowing the financial data presented in the company's subsequent reports (e.g., in MD&A) to look back to the two years prior to the company's registration;
- exempting emerging-growth companies from say-on-pay votes, say-on-golden-

parachute votes, and the disclosure of pay versus performance and the ratio of CEO-to-worker pay compensation, as required by the Dodd-Frank Act;

- exempting emerging-growth companies from Sarbanes-Oxley Section 404(b) auditor attestation of the company's internal controls and procedures;
- allowing emerging-growth companies to use scaled-back CD&A disclosure requirements;
- exempting emerging-growth companies from specified accounting and audit standards;
- allowing brokers and dealers, including underwriters participating in the emerging-growth company's IPO, to publish or distribute research reports about the emerging-growth company prior to and immediately following its IPO (without waiving rules and regulations relating to analysts' conflicts of interest);
- expanding the company's range of permissible pre-filing communications with qualified institutional buyers or accredited investors; and
- allowing emerging-growth companies to file a confidential registration statement with the SEC.

Following their IPOs, emerging-growth companies would have up to five years (or until they reach \$1 billion in annual revenues or \$700 million in public float) to fully comply with these rules and regulations.

The House of Representatives and Senate are considering other bills that also would have the effect of easing capital-raising for small and emerging-growth companies. The House has passed the following bills, which are now under consideration by the Senate:

- H.R. 2940, the "Access to Capital for Job Creators Act," which would ease the prohibitions on general solicitation and general advertising for certain private-placement transactions
- H.R. 2930, the "Entrepreneur Access to Capital Act," which would provide exemptions for certain crowd-funding transactions
- H.R. 1070, the "Small Company Capital Formation Act of 2011," which would increase the SEC's Regulation A offering threshold from \$5 million to \$50 million

The House is also considering H.R. 2167, the "Private Company Flexibility and Growth Act," which would increase the thresholds that require a company to register under the Securities Exchange Act of 1934. The law would increase the total-assets threshold from \$1 million to \$10 million, and it would increase the holders-of-record threshold from 500 to 1,000 persons, excluding employees and accredited investors.

For more information regarding this or any related matter, please contact your regular Wilson Sonsini Goodrich & Rosati attorney or a member of the firm's corporate and securities practice.

¹ For more information, please visit <http://thomas.loc.gov/cgi-bin/query/z?c112:S.1933>.

² The IPO Task Force's report is available for download at <http://www.wsgr.com/PDFs/rebuilding-IPO.pdf>.

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