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.

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 2011”. 
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; and

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

(c) OTHER DEFINITIONS.—As used in this title, the following 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.

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 inserting “An emerging growth company shall be exempt from the requirements of subsections (a) and (b).” before “The Commission may”; and

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

(3) Compensation disclosures.—Section 953(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Public Law 111–203; 124 Stat. 1904) is amended by inserting “, other than an emerging growth company, as that term is defined in section 3(a) of the Securities Ex-

change Act of 1934,” after “require each issuer”.

(b) Financial disclosures.—

(1) Securities Act of 1933.—Section 7(a) of the Securities Act of 1933 (15 U.S.C. 77g(a)) is amended by adding at the end the following: “An emerging growth company 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 of-
fering 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 financial data for any period prior to the earliest audited period presented in connection with its initial public offering.”.
(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 financial data for any period prior to the earliest audited period presented in connection with its initial public offering.”.

(c) New Accounting Pronouncements.—Section 19(b)(1)(A) of the Securities Act of 1933 (15 U.S.C. 77s(b)(1)(A)) is amended—

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

(2) by adding at the end the following:

“(vi) has not established any accounting principles that would require an emerging growth company to comply with any new or revised financial accounting standard as of an effective date that is earlier than the effective date that applies to a company that is not an issuer, as defined in section 2(a)(7) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201(a)(7)); and’’.
(d) OTHER DISCLOSURES.—An emerging growth company may comply with section 229.303(a) of title 17 of the 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 subsection (b). An emerging growth company may comply with section 229.402 of title 17 of the 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 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 any emerging growth company, unless the Commission determines that the application of such additional requirements to emerging growth companies 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 statement 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 15D of the Securities Exchange Act of 1934 (15 U.S.C. 78o-6) is amended—

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

(2) by inserting after subsection (b) the following:

“(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 con-
nection with an initial public offering of the common eq-

uity 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 par-

ticipating in any communications with the manage-

ment of an emerging growth company that is also

attended by any other associated person of a broker,

dealer, or member of a national securities associa-

tion whose functional role is other than as a securi-

ties analyst.”.

(c) EXPANDING PERMISSIBLE COMMUNICATIONS.—

Section 5 of the Securities Exchange Act of 1933 (15

U.S.C. 77e) is amended—

(1) by redesignating subsection (d) as sub-

section (e); and

(2) by inserting after subsection (c) the fol-

lowing:

“(d) LIMITATION.—Notwithstanding any other provi-

sion 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 section 230.501(a) of title 17 of the Code of Federal
Regulations, or any successor thereto, to determine wheth-
er such investors might have an interest in a contemplated
securities offering, either prior to or following the date of
filing of a registration statement with respect to such se-
curities with the Commission, subject to the requirement
of subsection (b)(2).”.

(d) Post Offering Communications.—Neither
the Commission nor any national securities association
registered under section 15A of the Securities Exchange
Act of 1934 may adopt or maintain any rule or regulation
prohibiting any broker, dealer, or member of a national
securities association from publishing or distributing any
research report or making a public appearance, with re-
spect 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 emerg-
ing 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-
sociation and the emerging growth company or its shareholders that restricts or prohibits the sale of securities held by the emerging growth company or its shareholders after the initial public offering date.

SEC. 7. OTHER MATTERS.

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 company, prior to its initial public offering date, may confidentially submit to the Commission a draft registration 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 of the 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 subsection. For purposes of section 552 of title
5, United States Code, this subsection shall be con-
sidered a statute described in subsection (b)(3)(B) 
of such section 552. Information described in or ob-
tained pursuant to this subsection shall be deemed 
to constitute confidential information for purposes of 
section 24(b)(2) of the Securities Exchange Act of 
1934.”.