News Bulletin

April 20, 2011

U.S. Capital Raising in the Spotlight

The competitiveness of capital markets in the United States and the impact of regulations on capital raising activities by emerging companies have been put in the spotlight again by recent correspondence between Congressman Darrell Issa (R-CA), Chairman of the House Committee on Oversight and Government Reform, and Mary Schapiro, Chairman of the U.S. Securities and Exchange Commission. The wide-ranging inquiry from Chairman Issa elicited a thoughtful response from Chairman Schapiro, which carefully reviews the SEC's regulation of communications around initial public offerings and the viability of various private capital raising activities (including the growth of secondary markets for private company securities), as well as the broader economic and other factors behind a reduction in the number of public companies and initial public offerings in the United States. Chairman Schapiro outlined a number of new SEC initiatives in her response, including SEC staff review of (i) the restrictions on communications in initial public offerings; (ii) whether the general solicitation ban should be revisited; (iii) the number of shareholders that trigger public reporting, including questions regarding the use of Special Purpose Vehicles; and (iv) the regulatory questions posed by new capital raising strategies, such as "crowdfunding." Chairman Schapiro also indicated that the SEC is in the process of forming a new Advisory Committee on Small and Emerging Companies.

Background

On March 22, 2011, Chairman Issa sent a letter to Chairman Schapiro. The letter raised concerns about whether the current securities regulatory framework had a negative impact on capital formation which has led to the dearth of initial public offerings ("IPOs") in the U.S., as well as the extent to which SEC regulations potentially limited other capital raising activities by small and emerging companies.[1] The letter from Chairman Issa also sought specific information regarding the economic studies conducted by the SEC staff in these areas, along with information concerning the consideration of costs and benefits in connection with SEC rulemakings. In her response dated April 6, 2011, Chairman Schapiro stated that she has requested that the SEC staff take a fresh look at the agency's rules in order to develop ideas for the SEC about ways to reduce the regulatory burdens on small business capital formation in a manner consistent with investor protection.[2] The SEC's stated mission, as Chairman Schapiro reiterated in her letter, is to facilitate capital formation, along with protecting investors and maintaining fair and orderly markets.

Congressman Issa is Chairman of the Committee on Oversight and Government Reform in the House of Representatives. The Committee on Oversight and Government Reform has broad powers to, at any time, investigate any matter. Chairman Issa's letter was not joined by the House Financial Services Committee or the Senate Committee on Banking, Housing, and Urban Affairs, which are the Committees that oversee the SEC.

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[1] *See* http://www.knowledgemosaic.com/resourcecenter/Issa.041211.pdf.

[2] *See* http://www.sec.gov/news/press/schapiro-issa-letter-040611.pdf.

Chairman Issa's letter to Chairman Schapiro reflects a concern that the U.S. capital markets have become less competitive, as the number of IPOs in the U.S. has plummeted from an annual average of 530 during the 1990s to about 126 since 2001, with only 38 in 2008 and 61 in 2009.[3] The number of companies listed on the major U.S. exchanges peaked at more than 7,000 in 1997, and has been declining ever since, and is currently at about 4,000.[4] Meanwhile, the value of transactions in private-company shares has grown, almost doubling in 2010 to $4.6 billion, from about $2.4 billion in 2009 and is expected increase to $6.9 billion for 2011.[5] Chairman Issa's letter discussed these statistics and raised questions about the following topics: (i) the decline of the U.S. IPO market; (ii) the communications rules in connection with securities offerings; (iii) the 499-shareholder cap under Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act"); (iv) organizational considerations; and (v) new capital raising strategies. Chairman Schapiro's letter contained a detailed response to each of these topics.

Discussion

Decline of the IPO market in the U.S.

Chairman Issa's letter cited statistics about the declining U.S. IPO market and asked if the SEC evaluated the reasons for such decline. The letter asks if the possible reasons for the decline are increasingly complex SEC regulations, costs associated with compliance with the Sarbanes-Oxley Act of 2002 ("SOX"), the uncertainty generated by the pending rulemakings under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), the risk of class action lawsuits or the expansion of regulatory, legal and compliance burdens. The letter also cited examples of the IPOs of Google, Inc. and GoDaddy.com that were delayed and canceled, respectively, as evidence of overly burdensome communications rules.

In her response, Chairman Schapiro discussed various reasons for the decline in the IPO market, such as each company's own situation and market factors at the time of the contemplated IPO. She further indicated that the SEC conducts an extensive cost-benefit analysis prior to promulgating rules, and that it has minimized the costs of being a public company and maintained important investor protections to ensure that investors make responsible capital allocation decisions.

Chairman Schapiro stated that it is difficult to determine why a company decides to undertake an IPO or declines to do so. She stated that approximately 11 percent of new issuers filing registration statements for underwritten initial public offerings between January 2009 and March 2011 withdrew their registration statements and terminated their offerings. These companies cited various reasons for terminating their offerings, including unfavorable market conditions, a decision to pursue a merger/acquisition strategy or simply not conduct an IPO at that time. One issuer cited in its withdrawal request that it was withdrawing its registration statement because the benefits of being publicly traded were not sufficiently attractive to warrant proceeding with a public offering.

The costs associated with conducting an IPO and becoming a public reporting company factor into the decision as to whether to conduct an IPO. Chairman Schapiro stated that the SEC has lowered these costs in recent years and that, in 2010, approximately 40% of first-time registrants were smaller reporting companies. Similarly, in 2010, nearly half of registered offerings conducted by first-time registrants were for offerings less than $10 million. Insiders also may desire to maintain control, avoid ownership dilution and may not want to disclose vital information publicly. Chairman Schapiro cited one study that found that companies that had conducted IPOs ranked SEC reporting and SOX compliance costs as fairly low on their list of factors that affected their decision to

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[3] *See* http://www.gt.com/staticfiles//GTCom/Public%20companies%20and%20capital %20markets/Files/IPO%20crisis%20-%20June%202010%20-%20FINAL.pdf.

[4] *See id.*

[5] *See* http://online.wsj.com/article/SB10001424052748704630004576249182275134552.html?KEYWORDS=%22new+stock+rules%22.

conduct an IPO.[6] Other reasons cited for the declining U.S. IPO market were the protracted decline in stock prices and deteriorating market and industry conditions.

In a discussion about the challenges faced by early stage growth companies, Chairman Schapiro pointed out that such companies have greater difficulty raising capital because of the lack of disclosure on a regular basis, smaller and more variable cash flows, a smaller asset base and a larger percentage of intangible assets.

Chairman Schapiro also stated that while there are studies that show that the number of U.S. IPOs had declined,[7] there are other studies conducted by SEC staff members which indicate that for the period 1995-2007, the U.S. market's share of global IPOs in terms of total dollar proceeds and average dollar proceeds is much higher than those of the United Kingdom and Hong Kong.[8] The other reason for companies to favor an IPO in the European markets is that the underwriters' spread is significantly lower than in the U.S. For example, the gross spread in the U.S. for an offering size between $25-$100 million is approximately 7 percent, while in Europe it would be approximately 4 percent for a similar offering.

Chairman Schapiro also cited several studies which show that the effect of SOX on a company's decision to delist is minor and that delisting from U.S. exchanges is driven by the characteristics of the issuers and not by the decrease in competitiveness of the U.S. equity markets or the enactment of SOX. She stated that several academic studies have found that companies with weak corporate governance structures are more likely to go private and go dark as a result of SOX.[9]

The Impact of the Communications Rules in Connection With Securities Offerings

In his letter, Chairman Issa indicated that the communication rules governing the offerings of securities potentially conflict with the promotion of disclosure and transparency and the First Amendment. He requested an explanation for the potential harm that may realistically result to an unaccredited investor by the receipt of an advertisement by an issuer of unregistered securities that is targeted at accredited investors or Qualified Institutional Buyers ("QIBs"). He reiterated his point that the existing communications rules governing offerings stifle IPOs in the U.S. by citing to examples of the offering of Facebook shares to non U.S. investors, the delay of Google's IPO and the cancellation of the GoDaddy.com IPO.

In her response, Chairman Schapiro described the communications rules that apply to registered and unregistered offerings. Under the Securities Act of 1933 (the "Securities Act"), for registered offerings, an issuer's ability to communicate varies depending on the three phases of the registration process called the pre-filing period, quiet period and the post-effective period.[10] During the "pre-filing period" prior to the filing a registration statement, an issuer may not offer securities.[11] During the "quiet period" or "waiting period", an issuer can make oral offers but cannot make written offers other than through a prospectus that complies with Section 10 of the Securities

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[6] *See* J. Brau and S. Fawcett, *Initial Public Offerings: An Analysis of Theory and Practice*, Journal of Finance 61, 399-436 (2006).

[7] *See, e.g.* D. Weild and E. Kim, *A Wake Up Call for America*, Grant Thornton LLP (2009); Committee on Capital Markets Regulation, Continued Erosion in Competitiveness of the U.S. Equity Markets (2009).

[8] *See* C. Caglio, K. Weiss Hanley and Marietta-Westberg, *Going Public Abroad: The Role of International Markets for IPOs* (February 2011).

[9] *See* L. Austen and D. Dickens, *SOX Doomsday Predictions in Hindsight: Evidence from Delisting*, Current Issues in Auditing I, 21-27 (2007); E. Engel, R. Hayes, and X. Zhang, *The Sarbanes-Oxley Act and Firms Going Private Decisions,* Journal of Accounting and Economics 44, 116-45 (2007); B. Hansen, G. Pownall, and X. Wang, *The Robustness of the Sarbanes-Oxley Effect on the U.S. Capital Market*, Review of Accounting Studies 14, 404-39 (2009); C. Leuz, A. Triantis, and T. Y. Wang, *Why do Firms Go Dark? Causes and Economic Consequences of Voluntary SEC Deregistrations*, Journal of Accounting and Economics 45, 181-208 (2008).

[10] The Securities Act does not state when the pre-filing period begins. The SEC has stated that an issuer will be in registration at least from the time it begins preparing the related registration statement or the time it has reached an understanding with an underwriter, even if all the terms or conditions of the underwriting arrangement have not been agreed upon. *See* Release No. 33-5009, *Publication of Information Prior to or After the Filing and Effective Date of a Registration Statement Under the Securities Act of 1933* (October 7, 1969); Release No. 33-5180, *Guidelines for Release of Information by Issuers Whose Securities Are in Registration* (August 16, 1971).

[11] *See* Securities Act § 5(c).

Act.[12] In the post-effective period, an issuer can sell and deliver securities as long as a final prospectus that complies with Section 10(a) of the Securities Act accompanies or precedes the delivery of the securities.

Chairman Schapiro discussed the offering reforms adopted in 2005 that liberalized an issuer's ability to communicate during offerings.[13] The reforms included Rule 163A, which provides eligible issuers with a bright-line safe harbor for communications made more than 30 days before filing a registration statement, Rules 168 and 169 that allow issuers to continue to communicate factual business information in the ordinary course of business, Rules 405, 163, 164 and 433 that permit Free Writing Prospectuses, Rules 134 and 135 that allow issuers to communicate details about contemplated offerings and Rules 137, 138 and 139 that allow the publication of research reports. In addition, Rule 163 allows well-known seasoned issuers to make offers of securities before filing a registration statement.

Chairman Schapiro also clarified that had these rules been effective when Google and Salesforce.com conducted their IPOs, the SEC would not have imposed a cooling-off period to address gun-jumping concerns. In the case of Google, the SEC determined that the publication of the interview with the founders in Playboy did not inappropriately condition the market, given the timing of the publication and the inclusion of the text of the publication in the registration statement, and the SEC did not impose a cooling-off period. In the case of Salesforce.com, the SEC reached an opposite result, as the article in The New York Times contained significant amount of information about the company's IPO that was published while the road show was ongoing. Had the offering reforms been enacted at that time, the SEC would have required that the article be filed as a free writing prospectus. In contrast, the letter notes that Go Daddy decided to withdraw its registration statement because the chief executive officer of the company believed that he could not conduct his weekly radio show. Chairman Schapiro pointed out that the SEC's communications rules did not prohibit the chief executive officer of Go Daddy from conducting his radio show, rather the rules did not permit the chief executive officer of the company to use the weekly show as a means to promote the offering of Go Daddy's securities.

Chairman Schapiro's letter points out that with respect to offerings not registered under the Securities Act, issuers relying on Section 4(2) of the Securities Act or its safe harbor, Rule 506 of Regulation D, generally are not allowed to use a general solicitation or advertising to attract investors for its offering. In addition, the SEC adopted Rule 155, another safe harbor, that allows companies to abandon a public offering and instead raise money through a private offering. With respect to the offering of Facebook shares by Goldman Sachs that was cited in Chairman Issa's letter, Chairman Schapiro clarified that the staff did not advise or instruct Facebook or Goldman Sachs that the offering could not be conducted in the U.S.

Chairman Schapiro recognized that some view the general solicitation ban as a significant burden on capital raising and may be unnecessary as offerees who might be located through general solicitation and who might not purchase the securities would not be harmed.[14] Others, however, support the solicitation ban on the grounds that it helps prevent securities fraud by making it more difficult for fraudsters to attract investors or unscrupulous issuers to condition the market.[15] The Chairman also stated that the SEC has not yet had an occasion to consider the constitutionality of the quiet period rules under the First Amendment. Such issues have been raised in a no-action request which is still pending.

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[12] *See* Securities Act § 5(b)(1).

[13] *See* Release No. 33-8591, *Securities Offering Reform* (July 19, 2005), http://www.sec.gov/rules/finaI/33-8591.pdf.

[14] *See*, e.g., Final Report of the Advisory Committee on Smaller Public Companies to the U.S. Securities and Exchange Commission (April 23, 2006), http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf; Joseph McLaughlin, *How the SEC Stifles Investment - and Speech*, The Wall Street Journal (February 3, 2011). Concerns about the scope of the Commission's rules on general solicitation and advertising have been raised by the participants in the annual SEC Government-Business Forum on Small Business Capital Formation. *See* 2009 Annual SEC Government-Business Forum on Small Business Capital Formation Final Report (May 2010), http://www.sec.gov/info/smallbus/gbfor28.pdf.

[15] *See Pinter v. Dahl*, 486 U.S. 622, 644 (1988) ("The purchase requirement clearly confines §12 liability to those situations in which a sale has taken place. Thus, a prospective buyer has no recourse against a person who touts unregistered securities to him if he does not purchase the securities.").

The 499-Shareholder Cap Under Section 12(g) of the Exchange Act

Chairman Issa raised concerns about the 499 shareholder cap under Section 12(g) of the Exchange Act as being a fundamental roadblock to private equity capital formation. The letter went on to cite the case of the Facebook equity issuance where the 499 person threshold would have been overcome by grouping multiple shareholders into single entities. He questioned whether the use of special purpose vehicles ("SPVs") for the purposes of facilitating investments in private companies resulted in disjointed or illiquid markets and prevented price discovery.

In her letter, Chairman Schapiro stated that Rule 12(g) of the Exchange Act was enacted by Congress in 1964 and that the securities markets have changed significantly since then. Section 12(g) of the Exchange Act requires companies to register its securities with the SEC within 120 days after the last day of its fiscal year, if, at the end of the fiscal year, the securities are "held of record" by 500 or more persons and the company has "total assets" exceeding $10 million. Chairman Schapiro pointed out that today, the vast majority of shares of public companies are held in nominee or "street name" and, as a result, individual shareholders are not counted because the securities are not "held of record" by those individuals. Conversely, in private companies, shareholders generally hold their shares directly or "of record," and thus those companies may exceed the 499 shareholder limit under Rule 12(g), which would require them to commence reporting. Chairman Schapiro stated in her letter that the issue of how holders are counted and how many holders should trigger registration will need to be examined.

In his letter, Chairman Issa also raised concerns about Rule 12g5-1(b)(3) of the Exchange Act. That rule states that if an issuer knows that the form of holding securities of record is primarily used to circumvent Section 12(g), the beneficial holders will be deemed the record owners. Noting that this rule has been invoked sparingly, Chairman Schapiro stated that this rule is not meant to create uncertainty for issuers, but is rather intended to prevent issuers from circumventing the registration requirements.

Chairman Schapiro noted that Congress has provided the SEC with broad exemptive authority in Sections 12(h) and 36 of the Exchange Act with respect to the Section 12(g) registration requirements, and that Section 12(g) of the Exchange Act also allows the SEC to define the terms "held of record" and "total assets." Therefore, the SEC has the requisite authority to revise the shareholder threshold if it concludes that doing so is not inconsistent with the public interest or protection of investors.

In response to Chairman Issa's question about the use of SPVs that hold private company securities, Chairman Schapiro stated that the SEC has noted the trend of the use of SPVs, and that these vehicles raise a number of important policy issues that the SEC will consider. Chairman Schapiro also stated that the SEC is monitoring secondary trading on a number of platforms which facilitate trading of stock in private companies, noting that a balance must be struck between the benefit of increased liquidity and the investor protection concerns that can arise due to a lack of information about private companies. Chairman Schapiro noted that Rule 144A, which provides a non-exclusive safe harbor for specified resales of restricted securities to QIBs, was adopted for the primary purpose of removing uncertainties as to the legitimacy of resales to institutional buyers, may also be used by non-reporting issuers to raise capital through equity financings. She also noted that issuers using Rule 144A must be mindful of the mandatory registration threshold under Section 12(g) of the Exchange Act.

Organizational Considerations

In his letter, Chairman Issa raised concerns about the cost-benefit analysis that the SEC conducts prior to the promulgation of its regulations. In response, Chairman Schapiro stated that the SEC engages in an extensive cost-benefit analysis of every rule that it proposes and that it is a fundamental component of the process. She noted that senior staff at the agency reviews the cost-benefit analysis for each rulemaking and that such analysis is then reviewed thoroughly by each of the Commissioners prior to release for public comment. The comments and data provided by the public are carefully reviewed and taken into consideration prior to the adoption of final rules. Chairman Schapiro provided numerous examples of rules that the SEC adopted that facilitate capital formation for small businesses, including the simplification of disclosure and reporting requirements,[16] liberalizing the eligibility requirements for short-form registration statements,[17] adopting rules that allow companies to grant stock options without triggering the reporting requirements,[18] implementing electronic Regulation D filings,[19] amending Rule 144 to shorten holding periods,[20] and allowing for a phase-in period for implementation of the Say-on-Pay rules under the Dodd-Frank Act for smaller companies.[21] Chairman Schapiro also noted that the SEC recently proposed to modify the calculation of "net worth" for purposes of the "accredited investor" definition to exclude the value of an individual's primary residence when calculating net worth.[22] Chairman Schapiro noted that these examples are actions that facilitate capital formation, improve secondary market liquidity and strengthen private placement market, but nonetheless resulted in a diminished regulatory role for the agency.

New Capital Raising Strategies

The letter from Chairman Issa raised questions regarding "crowdfunding," singling that approach out as a possible new method of capital formation that has gained popularity.

Chairman Schapiro stated that she understands "crowdfunding" to be a new method of capital formation whereby groups of people pool money, typically small individual contributions, to support an effort by others to accomplish a specific goal. Initially, such arrangements did not trigger securities law issues because there was no profit participation. However, Chairman Schapiro noted that interest in offering an ownership interest in a developing business and an opportunity for a return on investment capital is growing. She provided an example of crowdfunding as described to the staff as an offering of up to a maximum of $100,000 of equity securities of a company, with individual investments capped at $100.

She noted that proponents of this approach to capital formation seek a registration exemption and the SEC has been exploring several approaches to address this.[23] In considering whether to grant an exemption from registration for such arrangements, Chairman Schapiro stated that the SEC would consider, for example, its experience with Securities Act Rule 504, which was revised in 1999 due to concerns about fraud in the market. The widespread use of the internet for capital raising presents additional challenges in this area.

Chairman Schapiro distinguished investments by venture capital firms in start-ups from investments made by financial institutions and institutional investors in typical companies, stating that venture capital firms have

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[16] *See* Release No. 33-8876, Smaller Reporting Company Regulatory Relief and Simplification (December 19, 2007), http://www.sec.gov/rules/final/2007/33-8876.pdf.

[17] *See* Release No. 33-8878, Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3 (December 19,2007), http://www.sec.gov/rules/finaI/2007/33-8878.pdf.

[18] *See* Release No. 34-56887, Exemption of Compensatory Employee Stock Options from Registration Under Section 12(g) of the Securities Exchange Act of 1934 (December 3, 2007), http://www.sec.gov/rules/final/2007/34-56887.pdf.

[19] *See* Release No. 33-8891, *Electronic Filing and Revision of Form D* (February 6, 2008), http://www.sec.gov/rules/finaI/2008/33-8891.pdf.

[20] *See* Release No. 33-8869, *Revisions to Rules* 144 *and* 145 (December 6, 2007), http://www.sec.gov/rules/finaI/2007/33-8869.pdf.

[21] *See* Release No. 33-9178, *Shareholder Approval of Executive Compensation and Golden Parachute Compensation* (January 25, 20II), http://www.sec.gov/rules/finaI/201l/33-9178.pdf.

[22] *See* Release No. 33-9177, *Net Worth Standard for Accredited Investors* (January 25, 2011), http://www.sec.gov/rules/proposed/2011/33-9177.pdf.

[23] For example, crowdfunding was discussed at the Commission's November 2010 Forum on Small Business Capital Formation. Participants in the Forum recommended that the Commission consider implementing a new exemption from Securities Act registration for crowdfunding, which would include offerings of up to $100,000 and a cap on individual investments not to exceed $100. In January 2011, representatives from the Division of Corporation Finance's Office of Small Business Policy met with a group from the Small Business & Entrepreneurship Council, which advocates an exemption from registration requirements for crowdfunding offerings meeting specific requirements. In addition, the Office of Small Business Policy and other members of the Division of Corporation Finance staff discussed crowdfunding with representatives from the North American Securities Administrators Association, the organization of state securities regulators, at a conference held on March 28, 2011.

developed mechanisms that allow them to successfully manage risk as they vigorously monitor their investments and furnish business expertise to their portfolio companies.

A Path Toward Further Reforms

The correspondence between Chairman Issa and Chairman Schapiro comes at a time when other reforms have been suggested as a means for spurring economic growth. For example, a proposed reform that was not mentioned in the correspondence between Chairman Schapiro and Chairman Issa, but that could potentially facilitate small company capital formation, is the Small Company Capital Formation Act of 2011 ("Small Company Capital Formation Act"). This bill was recently introduced by Representative David Schweikert (R-AZ) in the U.S. House of Representatives.[24] The bill seeks to increase the offering threshold from $5 million to $50 million for public offerings of smaller companies exempt from registration under the Securities Act pursuant to Regulation A. Representative Schweikert is the Vice Chairman of the House Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises. Regulation A's threshold of $5 million and a lack of a Blue Sky exemption have been limitations on smaller companies that want to access the capital markets. The Small Company Formation Act was introduced after hearings on the topic of capital formation were held in December 2010, during which industry representatives such as Mr. David Weild, Senior Advisor of Grant Thornton LLP, and William Hambrecht, CEO of WR Hambrecht + Co, expressed support for Regulation A reform as the beginning of a long awaited process to revive the small company IPO market. In addition to the other potential reforms discussed in Chairman Schapiro's letter, a Regulation A reform could also potentially serve to revitalize the U.S. IPO market.

Chairman Schapiro stated in her letter to Chairman Issa that she recently instructed her staff to review the impact of regulations on capital formation for small businesses, specifically focusing on the following areas:

- the restrictions on communications in IPOs;
- whether the general solicitation ban should be revisited in light of the current technologies and capital raising trends;
- the number of shareholders that trigger public reporting, including questions surrounding the use of SPVs that hold securities of private companies for groups of investors; and
- the regulatory questions posed by new capital raising strategies.

Chairman Schapiro indicated that this review will include an evaluation of the recommendations of the annual SEC Government-Business Forum on Small Business Capital Formation. The SEC has also created an email box for suggestions for reform on their website located at http://www.sec.gov/spotlight/regulatoryreviewcomments.shtml. Chairman Schapiro indicated that the SEC will also consider recommendations from a new Advisory Committee on Small and Emerging Companies.

[24] H.R. 1070, available at: http://www.gpo.gov/fdsys/pkg/BILLS-112hr1070ih/pdf/BILLS-112hr1070ih.pdf. Our News Bulletin entitled "Small Company Capital Formation Act of 2011; Regulation A Revival?" is available at: http://www.mofo.com/files/Uploads/Images/110330-Small-Company-Capital-Formation-Act-2011.pdf.

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