S.1933: The Reopening American Capital Markets to Emerging Growth Companies Act of 2011
Section-by-Section Summary

Section 1. Short Title. The "Reopening American Capital Markets to Emerging Growth Companies Act of 2011".

Section 2. Definitions. This section establishes a new category of issuers, called "Emerging Growth Companies", under the Securities Act of 1933 and the Securities Exchange Act of 1934. To qualify, a company must have less than $1 billion in annual revenues and, following the IPO, not more than $700 million in public float. When fully implemented, it is estimated that 11%-15% of public companies, representing 3% of total market capitalization, would qualify at any given time. Emerging Growth Company status would last only for a limited period (from one year up to a maximum of five years) after the IPO, depending on the size of the Emerging Growth Company.

Section 3. Disclosure Obligations.

(a) **Executive Compensation.** This section exempts Emerging Growth Companies from the requirement to hold a shareholder vote at least once every three years on executive compensation packages – the so-called "say-on-pay" vote – and executive severance payments known as "golden parachutes". It also exempts Emerging Growth Companies from the requirement to disclose the relationship between executive compensation and financial performance and the ratio of the CEO compensation to the median total compensation of all employees. As discussed below, Emerging Growth Companies will be required to provide detailed executive compensation disclosures based on existing SEC rules for companies with less than $75 million in public float. Emerging Growth Companies would also need to satisfy stock exchange governance requirements and provide all material information to investors, as required under current law.

(b) **Financial Disclosures.** This section requires Emerging Growth Companies to provide with their registration statement the same financial statements that smaller reporting companies currently provide (2 years of audited financials, rather than 3 years, as currently required for larger reporting companies) and phases in the requirement to provide a total of 5 years of financial data so that an Emerging Growth Company is not required to provide audited financial statements for periods prior to those provided with the registration statement.

(c) **New Accounting Pronouncements.** This section provides Emerging Growth Companies with the same extended compliance period for new accounting pronouncements as is currently available for private companies.

(d) **Other Disclosures.** This section provides that (i) the Management's Discussion and Analysis section of Emerging Growth Companies' periodic reports would be required to cover only those periods covered by audited financial statements and (ii) Emerging Growth Companies will be permitted to follow the same disclosure requirements for executive compensation (Item 402 of Reg S-K) as companies with less than $75 million in public float.

Section 4. Internal Controls Audit. This section would allow Emerging Growth Companies to defer compliance with Section 404(b) of Sarbanes-Oxley until the conclusion of the "on ramp" period, which would occur from one to five years after the IPO, depending on the size of the Emerging Growth Company. Under current law, all companies with less than $75 million in public float already are permanently exempt, and all newly public companies (regardless of size) benefit from a transition period of up to two years before they must comply with Section 404(b). In all cases, the companies' CEOs and CFOs must still maintain effective internal control over financial reporting and disclosure controls and procedures and certify personally such controls pursuant to Section 302 of Sarbanes-Oxley.

Section 5. Auditing Standards. This section exempts Emerging Growth Companies from certain proposed auditing standards – mandatory firm rotation and auditor's discussion and analysis – and requires the SEC to determine whether auditing standards adopted by PCAOB in the future should apply to Emerging Growth Companies, after considering investor protection, efficiency, competition and capital formation.

Section 6. Availability of Information About Emerging Growth Companies.

(a) **Provision of Research.** This section permits 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, even if the broker or dealer is participating or will participate in the offering. This section is designed to help Emerging Growth Companies gain equal footing by providing potential investors with greater access to information about Emerging Growth Companies. Large companies typically receive broad and continuous research coverage, and brokers and dealers are permitted to publish and distribute research reports about large companies they ordinarily cover during those companies' offering periods. This section would allow potential investors in Emerging Growth Companies access to similar information that they get for larger companies.

(b) **Securities Analyst Communications.** This section (i) permits members of the investment banking team for a broker or dealer participating in an offering to arrange for communications between securities analysts and potential investors and (ii) permits research analysts to participate in communications with management of the issuer that are also attended by other members of the broker or dealer. This section does not reduce existing substantive restrictions on the coordination of research and investment banking designed to protect against potential conflicts of interest, including Section 501 of Sarbanes-Oxley, the SEC's Regulation AC, the Global Research Analyst Settlement and disclosure requirements regarding potential conflicts of interest.

(c) **Expanding Permissible Communications.** This section would allow Emerging Growth Companies to "test the waters" prior to filing a registration statement by expanding the range of permissible pre-filing communications to sophisticated institutional investors. This would help Emerging Growth Companies determine the likelihood of a successful IPO. The antifraud provisions of the securities laws would still apply, and a prospectus would still be required prior to any sale.

(d) **Post Offering Communications.** This section would permit the publication and distribution of research reports about Emerging Growth Companies during post-IPO quiet periods and lock-up periods.

Section 7. Other Matters. This section permits U.S. companies to submit draft registration statements to the SEC on a confidential basis, as is currently permitted for non-U.S. companies. This would allow companies to begin the SEC registration process and to explore the possibility of an IPO without disclosing their most sensitive commercial and financial information to competitors in advance of determining the true feasibility of a successful IPO. Final registration materials (including all amendments resulting from the SEC review process) will still be required to be made publicly available to investors with adequate time for review prior to the IPO.