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## New Small Offering Exemption Receiving Support

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In the recent State of the Union address, President Obama called on Congress to pass a legislative package intended to stimulate small businesses and improve their ability to raise capital. If Congress heeds his call, small companies may soon be able to raise up to \$50 million in a 12-month period without undergoing a traditional initial public offering (IPO).

The Small Company Capital Formation Act of 2011 (H.R. 1070) was passed by the House of Representatives in early November by a nearly unanimous and bipartisan majority of 421-1. H.R. 1070 would amend the Securities Act of 1933 to allow a company to offer and sell up to \$50 million of its securities during a 12-month period, pursuant to certain terms and conditions under a special exemption from registration. If this legislation is enacted, a new type of offering would be created as a replacement for Regulation A offerings, which are currently capped at \$5 million. The legislation as drafted would require that securities be offered and sold publicly, but cannot be restricted. An identical version of the bill was introduced in the Senate (S. 1540) last year but has yet to make it past committee.

Companies using this new offering would be required to file an offering statement, likely similar to current Form 1-A, with the Securities and Exchange Commission (SEC). However, the company would be allowed to solicit interest in the offering prior to the filing of this statement. Annually thereafter, companies would be required to file audited financial statements, and the SEC would be given the power to require certain disclosures periodically regarding the company and its business operations, financial condition, corporate governance principles, and use of investor funds.

Although H.R. 1070 does not provide an exemption from state blue sky laws, if the securities are offered or sold on a national securities exchange, or if they are offered or sold to a “qualified purchaser” (to be defined by the SEC), they would be treated as “covered securities” for purposes of the National Securities Markets Improvement Act (NSMIA). The bill would also require the Comptroller General to conduct a study on the impact of state blue sky laws and report to certain committees in Congress.

To summarize, the new type of offering would differ from the current Regulation A offerings in a few key ways:

	<i>Regulation A Offering</i>	<i>H.R. 1070</i>
Maximum Offering Size	\$5 million	\$50 million
Audited Financials Required	No	Yes

Determining Interest in the Offering	Companies may “test the waters” to determine interest <sup>(1)</sup>	Companies allowed to “solicit” interest in the offering <sup>(2)</sup>
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(1) Currently, a company may “test the waters” by publishing or delivering to a prospective investor a written document or by making scripted radio or television broadcasts.

(2) The SEC would be given discretion to determine how a company can “solicit” an offering prior to filing the offering document.

There has been no progress since H.R. 1070 passed in November. But considering the overwhelming bipartisan support, [the explicit endorsement](#) by the White House to raise the Regulation A offering size to \$50 million in December, and the president’s [Blueprint for an America Built to Last](#) calling for expanded access to capital, we may see this legislation pass into law sometime this year. As Congress has now reconvened, we hope to see some new developments. We will continue to provide updates as this legislation progresses.

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