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ROLL UP, ROLL UP FOR THE MAGICAL MYSTERY TOUR

The House is expected to consider this week the "Jumpstart Our Business Startups Act." Through the magic of modern Washington politics, the bill rolls up three bills the House has already passed into one with a little twist of some additional bills for good measure.

SBLC works on a number of issues that are "good for small business," but I know odds are, there are very few of you are going to say, "I am going to run out and take advantage of this good news."

This legislation falls in that category. I doubt there are many SBLC Weekly readers that have ever dreamed about the Securities and Exchange Commission (SEC) in a good way (or at all for that matter.) Still the theory is if we can make it better from some entrepreneurs out there, it is a net plus for all. And beside who is better than making securities law sound almost slightly interesting than SBLC?

According to the House Rules Committee, what we will see largely reflects the text of H.R. 1070, H.R. 2930, and H.R. 2940 as passed by the House, H.R. 2167 as reported and H.R. 3606 as ordered reported by the Committee on

Financial Services, and H.R. 4088 as introduced.

If you want the full SBLC securities law primer, please see the 10-17-11 Weekly. You will need some of it to understand the context for this legislation.

H.R. 1070, the Small Company Capital Formation Act, introduced by Representative David Schweikert (R-AZ), changes the exemption under Regulation A from \$5 million, the threshold set in the early 1990s, to \$50 million. The principal advantages of Regulation A offerings, as opposed to full registration, are: The financial statements are simpler and don't need to be audited; there are no Exchange Act reporting obligations after the offering unless the company has more than \$10 million in total assets and more than 500 shareholders; companies may choose among three formats to prepare the offering circular, one of which is a simplified question-and-answer document; and a company may "test the waters" to determine if there is adequate interest in the securities before going through the expense of filing with the SEC.

H.R. 2940 was introduced by Representative Kevin McCarthy (R-CA). Under Rule 506 of Regulation D (Regulation D sets

the parameters for private offerings; see that primer of 10-17-11 Weekly), certain companies may be exempt from SEC registration if they meet specific conditions, including a prohibition on "general solicitation" and remain a private company. The general solicitation prohibition has been interpreted to mean that potential investors must have a pre-existing relationship with an issuer or intermediary before the potential investor can be notified that unregistered securities are available for sale. The legislation would remove the solicitation prohibition under Regulation D.

H.R.2930, introduced by Representative Patrick McHenry (R-NC), would permit "crowdfunding." Under current law, SEC registration is required if there are more than 500 shareholders. There are also prohibitions on general solicitation. The legislation would permit some small solicitations but conducted on a wider scale like through the Internet. The parameters would be for transactions involving the issuance of securities for which the aggregate annual amount raised through the issue of the securities is \$5,000,000 or less and the individual investments in the securities are limited to an aggregate annual amount equal to

the lesser of \$10,000 or 10 percent of the investor's annual income.

H.R.2167, introduced by Representative David Schweikert (R-AZ), changes the thresholds for total assets and for class of equity security holders of record which trigger the requirement for a securities issuer to register with the Securities and Exchange Commission. The bill increases the total assets threshold from \$1 million to \$10 million, and the class of equity security holders of record threshold from 500-750 to 1,000 persons.

H.R. 3606, the "Reopening American Capital Markets to Emerging Growth Companies Act," introduced by Representative Stephen Fincher (R-TN) amends the Securities Act of 1933 to establish a new category of issuers known as "Emerging Growth Companies" (EGCs), which are issuers that have total annual gross revenues of less than \$1 billion. H.R. 3606 exempts EGCs from certain regulatory requirements until the earliest of three dates: (1) five years from the date of the EGC's initial public offering; (2) the date an EGC has \$1 billion in annual gross revenue; or (3) the date an EGC becomes a "large accelerated filer," which is defined by the Securities and Exchange Commission (SEC) as a company that has a worldwide public float of \$700 million or more.

H.R. 4088, the Capital Expansion Act, was introduced by Representative Benjamin Quayle (R-AZ) makes changes to the Securities Exchange Act of 1934 to allow more investors for community banks.

There is a better than average chance in this Congress that some or all of these concepts whether packaged together or separately will make it to the President's desk. There is also a good chance that if they get that far, the President would sign a bill or bills. This has unofficially been designated a "safe zone" for bipartisan cooperation.

POSTER, POSTER ON THE WALL WHO IS THE MOST COMPLIANT OF ALL?

You may recall that last year, the National Labor Relations Board (NLRB) took several actions that were considered controversial within the business community. One of them was to approve a poster that virtually ALL employers will have to post beginning April 30, 2012. The poster requires employers to inform employees of their workplace rights. (www.nlr.gov/poster) Some in the business community say the poster encourages employees to think about organizing. The requirement to post was delayed when the NLRB discovered that many employers, especially small businesses, did not think they had to post the poster since they did not have a union. The reality is that most employers are covered by the National Labor Relations Act even if you do not have a union and for most regardless of your size. (There ARE some size and industry exemptions and see the 08-29-11 Weekly for the full details.) For the rest of us the poster must go up.

Some business groups sued the NLRB and said it did not have the authority to issue the poster. A federal court has ruled that "Yes,

the NLRB did have the authority, but..." The "but" is that the court said the NLRB stretched the interpretation of what its enforcement authority allows it to do. The bottom line is that the NLRB cannot do much. The NLRB wanted the failure to post to be an "automatic" unfair labor practice. The court rejected that and the NLRB's effort to penalize employers by extending the statute of limitations for unfair labor practice complaints if you did not post the poster. What's left? The decision says, "The Court points out that nothing in this decision prevents the Board from finding that a failure to post constitutes an unfair labor practice in any individual case brought before it."

Since the decision gave neither side what it wanted, it is possible there will be an appeal.

There was some buzz around this lawsuit about the fact the President made the controversial "recess" appointments and the effect of that action on this poster program. When the poster requirement was promulgated, the court said the NLRB had a legitimate majority – no surprise there, it did. There is an open question, at least in some quarters, whether the NLRB has a current operating majority. If it does not, the NLRB cannot do much to enforce regulations in place or create new ones.