

PRIVATE COMPANY FLEXIBILITY AND GROWTH ACT

DECEMBER 12, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BACHUS, from the Committee on Financial Services,
submitted the following

R E P O R T

[To accompany H.R. 2167]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 2167) to amend the Securities Exchange Act of 1934 to change the threshold number of shareholders for required registration under that Act, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Private Company Flexibility and Growth Act”.

SEC. 2. THRESHOLD FOR REGISTRATION.

Section 12(g)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(g)(1)) is amended by striking “shall—” and all that follows through the first instance of “register” and insert “shall, within 120 days after the last day of its first fiscal year ended on which the issuer has total assets exceeding \$10,000,000 and a class of equity security (other than an exempted security) held of record by 1,000 persons, register”.

SEC. 3. EMPLOYEES.

Section 12(g)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(g)(5)) is amended by adding at the end the following: “For purposes of determining whether an issuer is required to register a security with the Commission pursuant to paragraph (1), the definition of ‘held of record’ shall not include securities held by persons who received the securities pursuant to an employee compensation plan in transactions exempted from the registration requirements of section 5 of the Securities Act of 1933.”.

SEC. 4. COMMISSION RULEMAKING.

The Securities and Exchange Commission shall revise the definition of “held of record” pursuant to section 12(g)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(g)(5)) to implement the amendment made by section 2. The Commission

shall also adopt safe harbor provisions that issuers can follow when determining that holders of their securities received the securities pursuant to an employee compensation plan in transactions that were exempt from the registration requirements of section 5 of the Securities Act of 1933.

PURPOSE AND SUMMARY

H.R. 2167, the “Private Company Flexibility and Growth Act,” raises the threshold for mandatory registration under the Securities Exchange Act of 1934 (the “Exchange Act”) from 500 shareholders to 1,000 shareholders for all companies and excludes securities held by shareholders who received such securities under employee compensation plans from the calculation. Raising the shareholder threshold would eliminate one impediment to capital formation for small companies.

BACKGROUND AND NEED FOR LEGISLATION

Capital formation is necessary for job creation. Companies obtain capital through borrowing or equity financing. Because banks have tightened their lending standards in the wake of the economic crisis, there is less credit available to fund growth. Accordingly, equity financing, in which investors purchase ownership stakes in a company in exchange for a share of the company’s future profits, is an increasingly essential means of providing small companies with the capital they need to grow and create jobs. Unfortunately, regulations such as the Exchange Act’s shareholder threshold inhibit capital formation.

Section 12(g) of the Exchange Act requires issuers to register equity securities with the Securities and Exchange Commission (SEC) if those securities are held by 500 or more record holders and the company has total assets of more than \$10 million. After a company registers with the SEC under section 12(g), it must comply with all of the Exchange Act’s reporting requirements, which include filing annual reports on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K, and proxy statements on schedule 14A. The shareholder threshold—which has not been adjusted since it was adopted in 1964—has become an impediment to capital formation for small startup companies that are innovative and create jobs.

At a legislative hearing on H.R. 2167 held by the Subcommittee on Capital Markets and Government Sponsored Enterprises on September 21, 2011, Barry Silbert, Chief Executive Officer of SecondMarket, Inc., explained that the 500 shareholder threshold “has created a disincentive for private companies to hire new employees, or acquire other businesses for stock, as these private companies are fearful of taking on too many shareholders.” Mr. Silbert also testified that the current threshold “discourages companies from providing stock option-based compensation to employees, removing one of the great economic incentives attracting the country’s best and brightest employees to startups.”

HEARINGS

On September 21, 2011, the Subcommittee on Capital Markets and Government Sponsored Enterprises held a hearing entitled “Legislative Proposals to Facilitate Small Business Capital Forma-

tion and Job Creation,” to consider H.R. 2167 and four other bills. The following witnesses testified:

- Ms. Meredith Cross, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission
- Mr. Vincent Molinari, Founder and Chief Executive Officer, GATE Technologies LLC
- Mr. Barry E. Silbert, Founder and Chief Executive Officer, SecondMarket, Inc.
- Mr. Matthew H. Williams, Chairman and President, Gothenburg State Bank, on behalf of the American Bankers Association
- Mr. William D. Waddill, Senior Vice President and Chief Financial Officer, OncoMed Pharmaceuticals, Inc., on behalf of the Biotechnology Industry Organization
- Mr. A. Heath Abshire, Commissioner, Arkansas Securities Department on behalf of the North American Securities Administrators
- Ms. Dana Mauriello, President, ProFounder

COMMITTEE CONSIDERATION

The Subcommittee on Capital Markets and Government Sponsored Enterprises met in open session on October 5, 2011, and ordered H.R. 2167, as amended, favorably reported to the full Committee by voice vote.

The Committee on Financial Services met in open session on October 26, 2011 and ordered H.R. 2167, as amended, favorably reported to the House by voice vote.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto.

On October 26, 2011, the Committee on Financial Services met in open session and ordered H.R. 2167, as amended, favorably reported to the House by voice vote.

During consideration of H.R. 2167 by the Committee, the following amendment was considered:

1. An amendment offered by Mr. Miller of NC, no. 1, to restrict the number of non-accredited investors to 500 persons, was not agreed to by a record vote of 23 yeas and 33 nays (Record vote no. FC-51).

RECORD VOTE NO. FC-51

Representative	Aye	Nay	Present	Representative	Aye	Nay	Present
Mr. Bachus		X	.....	Mr. Frank (MA)	X	.....	.....
Mr. Hensarling		X	.....	Ms. Waters	X	.....	.....
Mr. King (NY)		X	.....	Mrs. Maloney	X	.....	.....
Mr. Royce		X	.....	Mr. Gutierrez	X	.....	.....
Mr. Lucas		X	.....	Ms. Velázquez	X	.....	.....
Mr. Paul		X	.....	Mr. Watt	X	.....	.....
Mr. Manzullo		X	.....	Mr. Ackerman .....		.....	.....
Mr. Jones		X	.....	Mr. Sherman	X	.....	.....
Mrs. Biggert		X	.....	Mr. Meeks	X	.....	.....
Mr. Gary G. Miller (CA)	Mr. Capuano	X	.....	.....
Mrs. Capito		X	.....	Mr. Hinojosa .....		.....	.....
Mr. Garrett		X	.....	Mr. Clay	X	.....	.....

RECORD VOTE NO. FC-51—Continued

Representative	Aye	Nay	Present	Representative	Aye	Nay	Present
Mr. Neugebauer		X	.....	Mrs. McCarthy (NY) .....			.....
Mr. McHenry		X	.....	Mr. Baca	X		.....
Mr. Campbell		X	.....	Mr. Lynch	X		.....
Mrs. Bachmann	Mr. Miller (NC)	X		.....
Mr. McCotter		X	.....	Mr. David Scott (GA)	X		.....
Mr. McCarthy (CA)		X	.....	Mr. Al Green (TX)	X		.....
Mr. Pearce		X	.....	Mr. Cleaver	X		.....
Mr. Posey		X	.....	Ms. Moore	X		.....
Mr. Fitzpatrick		X	.....	Mr. Ellison	X		.....
Mr. Westmoreland		X	.....	Mr. Perlmutter	X		.....
Mr. Luetkemeyer		X	.....	Mr. Donnelly	X		.....
Mr. Huizenga		X	.....	Mr. Carson	X		.....
Mr. Duffy		X	.....	Mr. Himes		X	.....
Ms. Hayworth		X	.....	Mr. Peters	X		.....
Mr. Renacci		X	.....	Mr. Carney	X		.....
Mr. Hurt		X	.....			
Mr. Dold		X	.....			
Mr. Schweikert		X	.....			
Mr. Grimm		X	.....			
Mr. Canseco		X	.....			
Mr. Stivers		X	.....			
Mr. Fincher		X	.....			

The following amendments and motion were also considered by the Committee:

1. An amendment offered by Mr. Capuano, no. 2, to include beneficial shareholders in the calculation of the threshold for registration; and to require the Securities and Exchange Commission to revise the definition of “beneficial holder” or “beneficially held” to include multiple shareholders invested in a single special purpose vehicle, was offered and withdrawn.

2. An amendment offered by Mr. Schweikert, no. 3, to change the shareholder registration threshold from 1,000 to 2,000 persons, was offered and withdrawn.

3. A motion offered by Mr. Bachus to move the previous question on H.R. 2167 was agreed to by voice vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee has held hearings and made findings that are reflected in this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee establishes the following performance related goals and objectives for this legislation:

The objective of H.R. 2167, the “Private Company Flexibility and Growth Act,” is to raise the threshold for mandatory registration under the Securities Exchange Act of 1934 (the “Exchange Act”) from 500 shareholders to 1,000 shareholders for all companies and excludes securities held by shareholders who received such securities under employee compensation plans from the threshold. In raising the shareholder threshold, the bill would eliminate one impediment to capital formation for small companies.

Companies obtain capital through borrowing or equity financing. Because banks have tightened their lending standards in the wake

of the economic crisis, there is less credit available to fund growth. Accordingly, equity financing, in which investors purchase ownership stakes in a company in exchange for a share of the company's future profits, is an increasingly essential means of providing small companies with the capital they need to grow and create jobs. The regulations such as the Exchange Act's shareholder threshold inhibit capital formation.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX
EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 28, 2011.

Hon. SPENCER BACHUS,
*Chairman, Committee on Financial Services,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2167, the Private Company Flexibility and Growth Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 2167—Private Company Flexibility and Growth Act

Under current law, companies with assets greater than \$10 million that have issued a class of security held by more than 500 people must register securities with the Securities and Exchange Commission (SEC) if those securities are to be traded on a registered exchange. H.R. 2167 would amend the statute to set the asset limit at greater than \$10 million for any issuer (the limit under current law is specified in SEC regulations) and to raise the threshold for ownership of an entity's stock to 1,000 persons. The bill would exclude persons who received stock as part of an employee compensa-

tion plan from the number of persons holding a security when determining whether the stock-ownership threshold has been met.

Based on information from the SEC, CBO estimates that implementing H.R. 2167 would have a negligible impact on the SEC's workload, and any change in agency spending that is subject to appropriation would not be significant. Enacting H.R. 2167 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 2167 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Susan Willie. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of the section 102(b)(3) of the Congressional Accountability Act.

EARMARK IDENTIFICATION

H.R. 2167 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This section provides a short title to the bill by citing it as the "Private Company Flexibility and Growth Act."

Section 2. Threshold for registration

This section amends section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") by raising the threshold for mandatory registration under the Exchange Act from 500 shareholders to 1,000 shareholders for all companies.

Section 3. Employees

This section provides that persons who received securities under employee compensation plans shall not count against the shareholder threshold cap in section 12(g) of the Exchange Act.

Section 4. Commission rulemaking

This section requires the SEC to issue regulations to revise the definition of “held of record” pursuant to section 12(g)(5) of the Exchange Act and to adopt safe harbor provisions that issuers can follow when determining that holders of their securities received the securities pursuant to an employee compensation plan.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECURITIES EXCHANGE ACT OF 1934

TITLE I—REGULATION OF SECURITIES EXCHANGES

* * * * *

REGISTRATION REQUIREMENTS FOR SECURITIES

SEC. 12. (a) * * *

* * * * *

(g)(1) Every issuer which is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce [shall—

[(A) within one hundred and twenty days after the last day of its first fiscal year ended after the effective date of this subsection on which the issuer has total assets exceeding \$1,000,000 and a class of equity security (other than an exempted security) held of record by seven hundred and fifty or more persons; and

[(B) within one hundred and twenty days after the last day of its first fiscal year ended after two years from the effective date of this subsection on which the issuer has total assets exceeding \$1,000,000 and a class of equity security (other than an exempted security) held of record by five hundred or more but less than seven hundred and fifty persons,

[register] *shall, within 120 days after the last day of its first fiscal year ended on which the issuer has total assets exceeding \$10,000,000 and a class of equity security (other than an exempted security) held of record by 1,000 persons, register* such security by filing with the Commission a registration statement (and such copies thereof as the Commission may require) with respect to such security containing such information and documents as the Commission may specify comparable to that which is required in an application to register a security pursuant to subsection (b) of this section. Each such registration statement shall become effective sixty days after filing with the Commission or within such shorter period as the Commission may direct. Until such registration statement becomes effective it shall not be deemed filed for the purposes of section 18 of this title. Any issuer may register any class of equity security not required to be registered by filing a registration state-

ment pursuant to the provisions of this paragraph. The Commission is authorized to extend the date upon which any issuer or class of issuers is required to register a security pursuant to the provisions of this paragraph.

* * * * *

(5) For the purposes of this subsection the term "class" shall include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. The Commission may for the purpose of this subsection define by rules and regulations the terms "total assets" and "held of record" as it deems necessary or appropriate in the public interest or for the protection of investors in order to prevent circumvention of the provisions of this subsection. For purposes of this subsection, a security futures product shall not be considered a class of equity security of the issuer of the securities underlying the security futures product. *For purposes of determining whether an issuer is required to register a security with the Commission pursuant to paragraph (1), the definition of "held of record" shall not include securities held by persons who received the securities pursuant to an employee compensation plan in transactions exempted from the registration requirements of section 5 of the Securities Act of 1933.*

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