

PRIVATE PLACEMENT IMPROVEMENT ACT OF 2016

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SEPTEMBER 6, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 4852]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 4852) to direct the Securities and Exchange Commission to revise Regulation D relating to exemptions from registration requirements for certain sales of securities, 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 Placement Improvement Act of 2016”.

**SEC. 2. REVISIONS TO SEC REGULATION D.**

Not later than 45 days following the date of the enactment of this Act, the Securities and Exchange Commission shall revise Regulation D (17 C.F.R. 501 et seq.) in accordance with the following:

(1) The Commission shall revise Form D filing requirements to require an issuer offering or selling securities in reliance on an exemption provided under Rule 506 of Regulation D to file with the Commission a single notice of sales containing the information required by Form D for each new offering of securities no earlier than 15 days after the date of the first sale of securities in the offering. The Commission shall not require such an issuer to file any notice of sales containing the information required by Form D except for the single notice described in the previous sentence.

(2) The Commission shall make the information contained in each Form D filing available to the securities commission (or any agency or office performing

like functions) of each State and territory of the United States and the District of Columbia.

(3) The Commission shall not condition the availability of any exemption for an issuer under Rule 506 of Regulation D (17 C.F.R. 230.506) on the issuer's or any other person's filing with the Commission of a Form D or any similar report.

(4) The Commission shall not require issuers to submit written general solicitation materials to the Commission in connection with a Rule 506(c) offering, except when the Commission requests such materials pursuant to the Commission's authority under section 8A or section 20 of the Securities Act of 1933 (15 U.S.C. 77h-1 or 77t) or section 9, 10(b), 21A, 21B, or 21C of the Securities Exchange Act of 1934 (15 U.S.C. 78i, 78j(b), 78u-1, 78u-2, or 78u-3).

(5) The Commission shall not extend the requirements contained in Rule 156 to private funds.

(6) The Commission shall revise Rule 501(a) of Regulation D to provide that a person who is a "knowledgeable employee" of a private fund or the fund's investment adviser, as defined in Rule 3c-5(a)(4) (17 C.F.R. 270.3c-5(a)(4)), shall be an accredited investor for purposes of a Rule 506 offering of a private fund with respect to which the person is a knowledgeable employee.

#### PURPOSE AND SUMMARY

Introduced by Rep. Scott Garrett on March 23, 2016, H.R. 4852, the "Private Placement Improvement Act of 2016," would direct the Securities and Exchange Commission (SEC) to revise Regulation D, relating to exemptions from registration requirements for certain sales of securities, in six prescribed ways:

- eliminate the requirement to file a Form D as a prerequisite to gaining Rule 506's safe harbor;
  - require the SEC to notify states' securities commissions of the information contained in the Form Ds filed on EDGAR;
  - prohibit the SEC from conditioning the availability of an exemption pursuant to Rule 506 of Regulation D on the issuer's filing with the SEC a Form D;
  - prohibit the SEC from requiring issuers conducting Rule 506(c) offerings to file its general solicitation materials (but not prohibiting the SEC from requesting such materials in certain situations);
  - exempt private funds from the requirements of Rule 156;
- and
- revise the definition of "accredited investor" in Rule 501(c) to include "knowledgeable employees" of private funds for Rule 506 purposes with respect to an offering of the private fund.

H.R. 4852 would facilitate a more streamlined and cost-effective process for companies to raise capital through private offerings in order to grow and create more jobs.

#### BACKGROUND AND NEED FOR LEGISLATION

Title II of the Jumpstart Our Business Startups Act (JOBS Act) (Public Law No: 112-106) makes it easier for startups to market their companies and sell their securities to investors. The Securities Act of 1933 requires that offers to sell securities must either be registered with the SEC or specifically exempted from such registration. One such exemption from the Securities Act is Regulation D Rule 506, which allows companies to offer securities for sale as long as they do not market their securities through general solicitations or advertising. Title II extends this exemption to securities marketed through a general solicitation or advertising so long as

the issuer verifies that purchasers of the securities are “accredited investors.”

Title II of the JOBS Act required the SEC to write and implement rules by July 4, 2012. The SEC missed that deadline, and instead proposed a rule for notice and comment in August 2012. On July 10, 2013, the SEC ultimately adopted a final rule to implement Title II of the JOBS Act and expand the exemption for general solicitation under Rule 506.

But at the same SEC open meeting, the SEC voted 3–2 to propose a separate rule that would impose new regulatory requirements on small companies seeking to use Rule 506 to raise capital. The proposed requirements are inconsistent with Congress’s intent to make it easier for startups and small companies to raise capital. The SEC’s rule proposal would impose burdensome requirements on companies seeking to use Rule 506’s exemption, such as requiring companies to submit additional Form D filings both in advance of offerings and after offerings have closed (bringing the total number of Form D filings from 1 to 3), and to file written general solicitation materials on an ongoing basis. The proposal would also impose the severe penalty of a one-year disqualification from using Rule 506 if a company failed to satisfy the Form D filing requirements, even if the failure was unintentional. The SEC has not yet acted on this rule proposal.

The “Private Placement Improvement Act of 2016” prevents the SEC from continuing down this inappropriate path. The bill prohibits the SEC from finalizing its proposed rule. Moreover, H.R. 4852 ensures that the SEC will implement Regulation D consistent with the intent of Congress.

In a June 2016 letter to Chairman Hensarling, the U.S. Chamber of Commerce cited the need for this legislation:

Title II of the JOBS Act directed the SEC to revise its rules to lift the ban on general solicitation for a private securities offering under Rule 506 of Regulation D. Unfortunately, simultaneous with the SEC’s final rule, the SEC proposed a rule that would impose unnecessary and burdensome obligations on issuers seeking to take advantage of Rule 506. This proposal, which remains pending, threatens to eliminate the very benefits the JOBS Act brought to small issuers. H.R. 4852 would prevent the SEC from implementing this proposal so that companies can invest in productive efforts, not compliance with unnecessary obligations that don’t benefit investors. The bill would also update Rule 506(c) to permit an issuer to file a single Form D with the SEC, which then would distribute it to each state’s respective securities commission. Streamlining regulatory filings is consistent with the spirit of the JOBS Act and would enhance the ability of small companies to focus limited resources on running the business and creating jobs.

Additionally, former SEC Commissioner Paul Atkins noted the importance of this legislation in testimony before the Capital Markets and Government Sponsored Enterprise Subcommittee in April 2016: “I believe that H.R. 4852, introduced by Chairman Garrett, is critically important to remove the regulatory uncertainty cur-

rently holding many issuers back from utilizing general solicitation under Rule 506(c) as Congress originally intended. H.R. 4852 would prevent the SEC from implementing the most burdensome provisions of its Reg D.”

#### HEARINGS

The Committee on Financial Services’ Subcommittee on Capital Markets and Government Enterprises held a hearing examining matters relating to H.R. 4852 on April 14, 2016.

#### COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on June 16, 2016, and ordered H.R. 4852 to be reported favorably to the House as amended by a recorded vote of 33 ayes to 26 nays (recorded vote no. FC-119), a quorum being present. An amendment offered by Mr. Garrett was agreed to 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. The sole recorded vote in committee was a motion by Chairman Hensarling to report the bill favorably to the House as amended. That motion was agreed to by a recorded vote of 33 ayes to 26 nays (Record vote no. FC-119), a quorum being present.

## Record vote no. FC-119

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Hensarling .....	X			Ms. Waters (CA) .....		X	
Mr. King (NY) .....	X			Mrs. Maloney (NY) .....		X	
Mr. Royce .....	X			Ms. Velázquez .....		X	
Mr. Lucas .....	X			Mr. Sherman .....		X	
Mr. Garrett .....	X			Mr. Meeks .....		X	
Mr. Neugebauer .....	X			Mr. Capuano .....		X	
Mr. McHenry .....	X			Mr. Hinojosa .....		X	
Mr. Pearce .....	X			Mr. Clay .....		X	
Mr. Posey .....	X			Mr. Lynch .....		X	
Mr. Fitzpatrick .....	X			Mr. David Scott (GA) .....		X	
Mr. Westmoreland .....	X			Mr. Al Green (TX) .....		X	
Mr. Luetkemeyer .....	X			Mr. Cleaver .....		X	
Mr. Huizenga (MI) .....	X			Ms. Moore .....		X	
Mr. Duffy .....	X			Mr. Ellison .....		X	
Mr. Hurt (VA) .....	X			Mr. Perlmutter .....		X	
Mr. Stivers .....	X			Mr. Himes .....		X	
Mr. Fincher .....				Mr. Carney .....		X	
Mr. Stutzman .....	X			Ms. Sewell (AL) .....		X	
Mr. Mulvaney .....	X			Mr. Foster .....		X	
Mr. Hultgren .....	X			Mr. Kildee .....		X	
Mr. Ross .....	X			Mr. Murphy (FL) .....		X	
Mr. Pittenger .....	X			Mr. Delaney .....		X	
Mrs. Wagner .....	X			Ms. Sinema .....		X	
Mr. Barr .....	X			Mrs. Beatty .....		X	
Mr. Rothfus .....	X			Mr. Heck (WA) .....		X	
Mr. Messer .....	X			Mr. Vargas .....		X	
Mr. Schweikert .....	X						
Mr. Guinta .....	X						
Mr. Tipton .....	X						
Mr. Williams .....	X						
Mr. Poliquin .....	X						
Mrs. Love .....	X						
Mr. Hill .....	X						
Mr. Emmer .....	X						

## COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the findings and recommendations of the Committee based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of 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 states that H.R. 4852 increases access to capital for regulated entities by prohibiting the SEC from imposing unnecessary regulatory burdens on Regulation D issuers.

## 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 ESTIMATES

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, August 1, 2016.*

Hon. JEB HENSARLING, *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. 4852, the Private Placement Improvement Act of 2016.

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

Sincerely,

MARK P. HADLEY,  
(For Keith Hall, *Director*)

Enclosure.

*H.R. 4852—Private Placement Improvement Act of 2016*

Under current law, the Securities and Exchange Commission (SEC) prohibits the sale or delivery of securities that have not been registered with the SEC. Certain transactions are exempt from

that prohibition but are subject to certain reporting requirements. H.R. 4852 would amend those requirements. H.R. 4852 also would prohibit the SEC from expanding certain reporting requirements and limit how the SEC uses the current information it collects.

On the basis of information provided by the SEC about the agency's current reporting requirements, CBO estimates that implementing H.R. 4852 would have no significant effect on the agency's costs to change current rules. Moreover, the SEC is authorized to collect fees sufficient to offset its annual appropriation; therefore, CBO estimates that the net effect on discretionary spending would be negligible, assuming appropriations actions consistent with that authority. Enacting H.R. 4852 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 4852 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 4852 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 Stephen Rabent. The estimate was approved by H. Samuel Papenfuss, 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. 4852 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

#### DUPLICATION OF FEDERAL PROGRAMS

Pursuant to section 3(g) of H. Res. 5, 114th Cong. (2015), the Committee states that no provision of H.R. 4852 establishes or re-authorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

## DISCLOSURE OF DIRECTED RULEMAKING

Pursuant to section 3(i) of H. Res. 5, 114th Cong. (2015), the Committee states that H.R. 4852 contains no directed rulemaking.

## SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

*Section 1: Short title*

This section cites H.R. 4852 as the “Private Placement Improvement Act of 2016.”

*Section 2: Revisions to SEC Regulation D*

This section directs the Securities and Exchange Commission (SEC) to revise the filing requirements of Regulation D to require an issuer that offers or sells securities in reliance upon a certain exemption from registration to file, no earlier than the 15 days after the date of the first sale of such securities, a single notice of sales containing the information required by Form D for each new offering of securities. The SEC shall not: (1) require the issuer to file any notice of sales containing the information required by Form D except for this single notice; (2) condition the availability of the Rule 506 exemption upon the filing of a Form D or similar report; or (3) require issuers to submit written general solicitation materials in connection with a limited offering subject to Rule 506, except when it requests such materials pursuant to specified authority.

This section also directs the SEC to revise a specified rule, regarding a Rule 506 offering of a private fund, to characterize as an accredited investor a “knowledgeable employee” of that private fund or the fund’s investment adviser. Additionally, this section prohibits the SEC from extending private funds the requirements governing investment company sales literature.

## MINORITY VIEWS

H.R. 4852 places limits on the Securities and Exchange Commission's (SEC) ability to finalize investor protections proposed in 2013. Specifically, H.R. 4852 places a number of prohibitions on the SEC, including barring it from requiring issuer pre-filing of a simple notice form when they sell unregistered securities, to imposing rules that stipulate how private funds are required to portray past income and losses to investors, and others. Because of these concerns, Democrats on the Committee unanimously voted against H.R. 4852, as well as identical legislation in the 113th Congress.

Democrats worked with Republicans to lift the ban on general solicitation and advertising under the Jumpstart Our Business Startups (JOBS) Act of 2012. Under Section 201(a) of the Act, issuers were afforded the opportunity to sell unregistered securities under a new Rule 506(c) exemption using means of solicitation and advertising. This includes publishing ads in newspapers and magazines, using public websites and emails, broadcasting communications over television and radio, and hosting seminars where attendees have been invited by general solicitation or general advertising.

When the SEC implemented this provision in July of 2013, the Commission proposed alongside that regulatory relief some very simple investor protections. The thinking expressed by the SEC Chair and certain SEC Commissioners at the time was that, if Congress and the Commission were going to end a decades-long prohibition on general solicitation and advertising, it would be appropriate to also move forward on several proposed amendments to enhance investor protection.

To date, the SEC has not finalized those proposed amendments; H.R. 4852 would prevent the SEC from ever doing so. Specifically, the bill would impede the Commission from requiring companies to file a simple notification form before using general solicitation or advertising to sell their unregistered securities—a crucial step to alert regulators to the existence of these unregistered offerings. H.R. 4852 would also prohibit the SEC from requiring companies to file their advertising materials with the SEC—a measure that would give regulators a view into potential misleading statements made by issuers. Finally, the bill would stop the SEC from applying the same rules that apply to mutual funds to hedge funds and private equity funds in terms of how they report performance of their fund to investors when they use the Rule 506(c) exemption.

The Democratic witness at the hearing in which this bill was considered, Mr. William Beatty, Washington State Securities Division Director, testified that the North American Securities Administrators Association (“NASAA”) opposes this bill as well as “any action by Congress to diminish the ability of the SEC to undertake prudent steps to limit the risks to investors resulting from the lift-

ing of the ban on general solicitation. Further, it would be a mistake for Congress to weaken the few existing investor protections in Rule 506, as this bill would in important ways." Mr. Beatty further testified that NASAA's concern is informed by the fact that Rule 506 fraud was the second most common type of fraud reported by their state members.

H.R. 4852 is likewise opposed by the Consumer Federation of America, as well as Americans for Financial Reform.

Because this legislation would tie the hands of the SEC, and prevent them from finalizing certain investor protections which are in the public interest, the Minority opposes H.R. 4852.

MAXINE WATERS.  
DENNY HECK.  
KEITH ELLISON.  
EMANUEL CLEAVER.  
GWEN MOORE.  
STEPHEN F. LYNCH.  
AL GREEN.  
JOYCE BEATTY.  
WM. LACY CLAY.  
RUBÉN HINOJOSA.  
JUAN VARGAS.

