

SMALL BUSINESS MERGERS, ACQUISITIONS, SALES, AND
BROKERAGE SIMPLIFICATION ACT OF 2013

JANUARY 14, 2014.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

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

R E P O R T

[To accompany H.R. 2274]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 2274) to amend the Securities Exchange Act of 1934 to provide for a notice-filing registration procedure for brokers performing services in connection with the transfer of ownership of smaller privately held companies and to provide for regulation appropriate to the limited scope of the activities of such brokers, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2013”.

SEC. 2. REGISTRATION EXEMPTION FOR MERGER AND ACQUISITION BROKERS.

Section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)) is amended by adding at the end the following:

“(13) REGISTRATION EXEMPTION FOR MERGER AND ACQUISITION BROKERS.—

“(A) IN GENERAL.—Except as provided in subparagraph (B), an M&A broker and any person associated with an M&A broker shall be exempt from registration under this section.

“(B) EXCLUDED ACTIVITIES.—An M&A broker or a person associated with an M&A broker is not exempt from registration under this paragraph if such broker or associated person does any of the following:

“(i) Directly or indirectly, in connection with the transfer of ownership of an eligible privately held company, receives, holds, transmits, or has custody of the funds or securities to be exchanged by the parties to the transaction.

“(ii) Engages on behalf of an issuer in a public offering of any class of securities that is registered, or is required to be registered, with the Commission under section 12 or with respect to which the issuer files, or is required to file, periodic information, documents, and reports under subsection (d).

“(C) RULE OF CONSTRUCTION.—Nothing in this paragraph shall be construed to limit any other authority of the Commission to exempt any person, or any class of persons, from any provision of this title, or from any provision of any rule or regulation thereunder.

“(D) DEFINITIONS.—In this paragraph:

“(i) CONTROL.—The term ‘control’ means the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. There is a presumption of control for any person who—

“(I) is a director, general partner, member or manager of a limited liability company, or officer exercising executive responsibility (or has similar status or functions);

“(II) has the right to vote 20 percent or more of a class of voting securities or the power to sell or direct the sale of 20 percent or more of a class of voting securities; or

“(III) in the case of a partnership or limited liability company, has the right to receive upon dissolution, or has contributed, 20 percent or more of the capital.

“(ii) ELIGIBLE PRIVATELY HELD COMPANY.—The term ‘eligible privately held company’ means a company that meets both of the following conditions:

“(I) The company does not have any class of securities registered, or required to be registered, with the Commission under section 12 or with respect to which the company files, or is required to file, periodic information, documents, and reports under subsection (d).

“(II) In the fiscal year ending immediately before the fiscal year in which the services of the M&A broker are initially engaged with respect to the securities transaction, the company meets either or both of the following conditions (determined in accordance with the historical financial accounting records of the company):

“(aa) The earnings of the company before interest, taxes, depreciation, and amortization are less than \$25,000,000.

“(bb) The gross revenues of the company are less than \$250,000,000.

“(iii) M&A BROKER.—The term ‘M&A broker’ means a broker engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of an eligible privately held company, regardless of whether the broker acts on behalf of a seller or buyer, through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the eligible privately held company, if the broker reasonably believes that—

“(I) upon consummation of the transaction, any person acquiring securities or assets of the eligible privately held company, acting alone or in concert, will control and, directly or indirectly, will be active in the management of the eligible privately held company or the business conducted with the assets of the eligible privately held company; and

“(II) if any person is offered securities in exchange for securities or assets of the eligible privately held company, such person will, prior to becoming legally bound to consummate the transaction, receive or have reasonable access to the most recent year-end balance sheet, income statement, statement of changes in financial position, and statement of owner’s equity of the issuer of the securities offered in exchange, and, if the financial statements of the issuer are audited, the related report of the independent auditor, a balance sheet dated not more than 120 days before the date of the offer, and information pertaining to the management, business, results of operations for the period covered by the foregoing financial statements, and material loss contingencies of the issuer.

“(E) INFLATION ADJUSTMENT.—

“(i) IN GENERAL.—On the date that is 5 years after the date of the enactment of the Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2013, and every 5 years thereafter, each dollar amount in subparagraph (D)(ii)(II) shall be adjusted by—

“(I) dividing the annual value of the Employment Cost Index For Wages and Salaries, Private Industry Workers (or any successor index), as published by the Bureau of Labor Statistics, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index (or successor) for the calendar year ending December 31, 2012; and

“(II) multiplying such dollar amount by the quotient obtained under subclause (I).

“(ii) ROUNDING.—Each dollar amount determined under clause (i) shall be rounded to the nearest multiple of \$100,000.”.

SEC. 3. EFFECTIVE DATE.

This Act and any amendment made by this Act shall take effect on the date that is 90 days after the date of the enactment of this Act.

Amend the title so as to read: A bill to amend the Securities Exchange Act of 1934 to exempt from registration brokers performing services in connection with the transfer of ownership of smaller privately held companies.

PURPOSE AND SUMMARY

Introduced by Rep. Bill Huizenga, H.R. 2274 is a bill to amend the Securities Exchange Act of 1934 to exempt mergers and acquisition brokers (“M&A broker”) from registration under that Act. The term “M&A broker” means a broker engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of a smaller privately held company. Despite the fact that an M&A broker does not engage directly or indirectly in securities or underwriting transactions, an M&A broker is subject to the same regulatory regime as a traditional broker-dealer. Those compliance costs are often passed on to the portfolio companies that are the M&A brokers’ clients, making the transfer of ownership more costly.

BACKGROUND AND NEED FOR LEGISLATION

According to a recent white paper released by Alliance of Merger and Acquisition Advisors (AM&AA) and the International Business Brokers Association, “M&A Brokers play a vital role in helping small- and mid-cap companies manage the transition from one owner to the next. Their services enable successful entrepreneurs to liquidate their accumulated capital and move on to the next phase of their lives—often retirement—while simultaneously aiding new entrepreneurs to invest their capital in the continued success of the company. This fosters continued economic development, growth, and innovation, all of which are critical to preserving and creating jobs.”

Despite the valuable services they provide to small business owners and investors, according to Shane Hansen with the Alliance of Merger & Acquisition Advisors, who testified at a June 12, 2013, hearing in the Capital Markets and Government Sponsored Enterprises Subcommittee, “The burdens and costs of initial broker-dealer registration and on-going compliance with current SEC and FINRA requirements are substantial. Initial set-up and compliance related costs often exceed \$150,000. On-going compliance costs often exceed \$75,000 per year.” Mr. Hansen added, “Substantially all of these costs are necessarily passed on to the business sellers and buyers who use the registered broker-dealer’s services. These high costs drive some business sellers and buyers to engage unreg-

istered M&A Brokers if they want professional assistance with their transactions.”

In an October 8, 2013 piece on The Hill’s website, Michael Nall, President of AM&AA, a leading international organization serving the middle-market M&A industry, stated, “HR 2274, the Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2013 is an excellent bipartisan bill, one whose time has come, and Congress should get it done before the end of the year. It’s not a sexy bill, not one that prime-time TV will be talking about, and not one that will evoke a question in the next presidential debates, but it’s a bill that does have teeth and it is a serious and substantive piece of small business legislation. . . . The current one-size-fits-all law treats the sale of a small, privately held business the same as a Wall Street investment banker selling securities of a public company. For instance, a sale of a local candy store with seller financing can technically be considered a securities transaction requiring broker-dealer registration with the SEC. There is a big difference between the sale of a small business to a buyer who will be active in managing the business after the sale and the sale to passive investors of securities of a publicly-traded company on the New York Stock Exchange. Current law does not distinguish between these two activities—and it should. It’s time for Washington to define the differences. HR 2274 does just that.”

According to the October 23, 2013, testimony of Tom Quaadman, Vice President of the Center for Capital Markets Competitiveness at the U.S. Chamber of Commerce, “[H.R. 2274] would simplify the registration of these brokers, it contains a number of safeguards to prevent abuses. . . . This is a common sense reform that should help entrepreneurs avail themselves of expert assistance in selling their business and realizing the full value of their enterprise, thereby providing further incentives for aspiring entrepreneurs to push forward with their ideas. By facilitating M&A activity, it would provide another source of capital for smaller companies.”

Heath Abshire, testifying on October 23, 2013, on behalf of the North American Securities Administrators Association (NASAA), stated “State securities administrators generally support the targeted, well-balanced provisions of H.R. 2274 . . . the traditional registration process for broker-dealers is not particularly well suited for the M&A Firms. Furthermore, individuals who work for these firms and earn commission-based compensation in M&A deals have the additional burden of affiliating with a registered broker-dealer firm in order to obtain registration. . . . Investor protection is best served when regulatory necessity and transparency is balanced sensibly with the practicalities inherent in any business model.”

HEARINGS

The Committee on Financial Services’ Subcommittee on Capital Markets and Government Sponsored Enterprises held a hearing on H.R. 2274 on October 24, 2013.

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on November 14, 2013, and ordered H.R. 2274, as amended, to be re-

ported favorably to the House by a recorded vote of 57 yeas to 0 nays (Record vote no. FC–38), a quorum being present.

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.

1. A motion by Chairman Hensarling to report the bill (H.R. 2274), as amended, to the House with a favorable recommendation was agreed to by a record vote of 57 yeas to 0 nays (Record vote no. FC–38). [please see attached vote tally]

RECORD VOTE NO. FC–38

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Hensarling	X	.....	.....	Ms. Waters	X	.....	.....
Mr. Gary G. Miller (CA)	X	.....	.....	Mrs. Maloney (NY)	X	.....	.....
Mr. Bachus	X	.....	.....	Ms. Velázquez	X	.....	.....
Mr. King (NY)	X	.....	.....	Mr. Watt	X	.....	.....
Mr. Royce	X	.....	.....	Mr. Sherman	X	.....	.....
Mr. Lucas	X	.....	.....	Mr. Meeks	X	.....	.....
Mrs. Capito	X	.....	.....	Mr. Capuano	X	.....	.....
Mr. Garrett	X	.....	.....	Mr. Hinojosa	X	.....	.....
Mr. Neugebauer	X	.....	.....	Mr. Clay	X	.....	.....
Mr. McHenry	X	.....	.....	Mrs. McCarthy (NY) .....	.....	.....	.....
Mr. Campbell .....	.....	.....	.....	Mr. Lynch .....	.....	.....	.....
Mrs. Bachmann .....	.....	.....	.....	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. Himes	X	.....	.....
Mr. Huizenga (MI)	X	.....	.....	Mr. Peters (MI)	X	.....	.....
Mr. Duffy	X	.....	.....	Mr. Carney	X	.....	.....
Mr. Hurt	X	.....	.....	Ms. Sewell (AL)	X	.....	.....
Mr. Grimm	X	.....	.....	Mr. Foster	X	.....	.....
Mr. Stivers	X	.....	.....	Mr. Kildee	X	.....	.....
Mr. Fincher	X	.....	.....	Mr. Murphy (FL)	X	.....	.....
Mr. Stutzman	X	.....	.....	Mr. Delaney	X	.....	.....
Mr. Mulvaney	X	.....	.....	Ms. Sinema	X	.....	.....
Mr. Hultgren	X	.....	.....	Mrs. Beatty	X	.....	.....
Mr. Ross	X	.....	.....	Mr. Heck (WA)	X	.....	.....
Mr. Pittenger	X	.....	.....				
Mrs. Wagner	X	.....	.....				
Mr. Barr	X	.....	.....				
Mr. Cotton	X	.....	.....				
Mr. Rothfus	X	.....	.....				

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 states that H.R. 2274, among other things, exempts mergers and acquisitions brokers from registration under the Securities Exchange Act of 1934.

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, December 9, 2013.

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. 2274, the Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2013.

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. 2274—Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2013

CBO estimates that implementing H.R. 2274 would lead to a minor increase in spending by the Securities and Exchange Commission (SEC) to clarify the applicability of regulations regarding registration requirements for brokers of mergers and acquisitions. The SEC is authorized to collect fees sufficient to offset its annual appropriation; therefore, CBO estimates that the net budgetary effect of implementing the bill would be negligible. Pay-as-you-go procedures do not apply to this legislation because it would not affect direct spending or revenues.

Under H.R. 2274, brokers engaging in certain securities transactions that involve transferring ownership of a privately held company would be exempt from requirements to register with the SEC. CBO expects that the change in the workload of the SEC to implement H.R. 2274 would not be significant because the bill would not require the agency to undertake a formal rulemaking.

H.R. 2274 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. The 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. 2274 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(j) of H. Res. 5, 113th Cong. (2013), the Committee states that no provision of H.R. 2274 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(k) of H. Res. 5, 113th Cong. (2013), the Committee states that H.R. 2274 requires the SEC to promulgate regulations to carry out the provisions of H.R. 2274.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This Section cites H.R. 2274 as the “Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2013.”

Section 2. Merger and acquisition brokers

This section prescribes the guidelines that govern whether and when a mergers and acquisitions broker, as defined in the bill, is exempt from registration under the Securities Exchange Act of 1934.

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 (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

SECURITIES EXCHANGE ACT OF 1934**TITLE I—REGULATION OF SECURITIES EXCHANGES**

* * * * *

REGISTRATION AND REGULATION OF BROKERS AND DEALERS

SEC. 15. (a) * * *

(b)(1) * * *

* * * * *

(13) REGISTRATION EXEMPTION FOR MERGER AND ACQUISITION BROKERS.—

(A) *IN GENERAL.*—Except as provided in subparagraph (B), an M&A broker and any person associated with an M&A broker shall be exempt from registration under this section.

(B) *EXCLUDED ACTIVITIES.*—An M&A broker or a person associated with an M&A broker is not exempt from registration under this paragraph if such broker or associated person does any of the following:

(i) *Directly or indirectly, in connection with the transfer of ownership of an eligible privately held company, receives, holds, transmits, or has custody of the funds or securities to be exchanged by the parties to the transaction.*

(ii) *Engages on behalf of an issuer in a public offering of any class of securities that is registered, or is required to be registered, with the Commission under section 12 or with respect to which the issuer files, or is required to file, periodic information, documents, and reports under subsection (d).*

(C) *RULE OF CONSTRUCTION.*—Nothing in this paragraph shall be construed to limit any other authority of the Commission to exempt any person, or any class of persons, from any provision of this title, or from any provision of any rule or regulation thereunder.

(D) *DEFINITIONS.*—In this paragraph:

(i) *CONTROL.*—The term “control” means the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. There is a presumption of control for any person who—

(I) *is a director, general partner, member or manager of a limited liability company, or officer exercising executive responsibility (or has similar status or functions);*

(II) has the right to vote 20 percent or more of a class of voting securities or the power to sell or direct the sale of 20 percent or more of a class of voting securities; or

(III) in the case of a partnership or limited liability company, has the right to receive upon dissolution, or has contributed, 20 percent or more of the capital.

(ii) **ELIGIBLE PRIVATELY HELD COMPANY.**—The term “eligible privately held company” means a company that meets both of the following conditions:

(I) The company does not have any class of securities registered, or required to be registered, with the Commission under section 12 or with respect to which the company files, or is required to file, periodic information, documents, and reports under subsection (d).

(II) In the fiscal year ending immediately before the fiscal year in which the services of the M&A broker are initially engaged with respect to the securities transaction, the company meets either or both of the following conditions (determined in accordance with the historical financial accounting records of the company):

(aa) The earnings of the company before interest, taxes, depreciation, and amortization are less than \$25,000,000.

(bb) The gross revenues of the company are less than \$250,000,000.

(iii) **M&A BROKER.**—The term “M&A broker” means a broker engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of an eligible privately held company, regardless of whether the broker acts on behalf of a seller or buyer, through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the eligible privately held company, if the broker reasonably believes that—

(I) upon consummation of the transaction, any person acquiring securities or assets of the eligible privately held company, acting alone or in concert, will control and, directly or indirectly, will be active in the management of the eligible privately held company or the business conducted with the assets of the eligible privately held company; and

(II) if any person is offered securities in exchange for securities or assets of the eligible privately held company, such person will, prior to becoming legally bound to consummate the transaction, receive or have reasonable access to the most recent year-end balance sheet, income statement, statement of changes in financial position, and statement of owner’s equity of the issuer of the securities offered in exchange, and, if the financial statements of the

issuer are audited, the related report of the independent auditor, a balance sheet dated not more than 120 days before the date of the offer, and information pertaining to the management, business, results of operations for the period covered by the foregoing financial statements, and material loss contingencies of the issuer.

(E) INFLATION ADJUSTMENT.—

(i) IN GENERAL.—On the date that is 5 years after the date of the enactment of the Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2013, and every 5 years thereafter, each dollar amount in subparagraph (D)(ii)(II) shall be adjusted by—

(I) dividing the annual value of the Employment Cost Index For Wages and Salaries, Private Industry Workers (or any successor index), as published by the Bureau of Labor Statistics, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index (or successor) for the calendar year ending December 31, 2012; and

(II) multiplying such dollar amount by the quotient obtained under subclause (I).

(ii) ROUNDING.—Each dollar amount determined under clause (i) shall be rounded to the nearest multiple of \$100,000.

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