

115TH CONGRESS
2D SESSION

S. 3518

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.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 27, 2018

Mr. PETERS (for himself and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Small Business Merg-
5 ers, Acquisitions, Sales, and Brokerage Simplification Act
6 of 2018”.

1 **SEC. 2. REGISTRATION EXEMPTION FOR MERGER AND AC-**
 2 **QUISITION BROKERS.**

3 Section 15(b) of the Securities Exchange Act of 1934
 4 (15 U.S.C. 78o(b)) is amended by adding at the end the
 5 following:

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

8 “(A) DEFINITIONS.—In this paragraph:

9 “(i) BUSINESS COMBINATION RE-
 10 LATED SHELL COMPANY.—The term ‘busi-
 11 ness combination shell company’ means a
 12 shell company that is formed by an entity
 13 that is not a shell company solely for the
 14 purpose of—

15 “(I) changing the corporate
 16 domicile of that entity solely within
 17 the United States; or

18 “(II) completing a business com-
 19 bination transaction (as defined in
 20 section 230.165(f) of title 17, Code of
 21 Federal Regulations) among 1 or
 22 more entities other than the company
 23 itself, none of which is a shell com-
 24 pany.

25 “(ii) CONTROL.—

1 “(I) IN GENERAL.—The term
 2 ‘control’ means the power, directly or
 3 indirectly, to direct the management
 4 or policies of a company, whether
 5 through ownership of securities, by
 6 contract, or otherwise.

7 “(II) PRESUMPTION.—For the
 8 purposes of this clause, a person shall
 9 be presumed to have control under
 10 any of the following circumstances:

11 “(aa) The person is a direc-
 12 tor, general partner, member, or
 13 manager of a limited liability
 14 company, or a corporate officer
 15 of a corporation or limited liabil-
 16 ity company, and exercises execu-
 17 tive responsibility (or has similar
 18 status or functions).

19 “(bb) The person has—
 20 “(AA) the right to vote
 21 not less than 25 percent of a
 22 class of voting securities; or
 23 “(BB) the power to sell
 24 or direct the sale of not less

1 than 25 percent of a class of
2 voting securities.

3 “(cc) In the case of a part-
4 nership or a limited liability com-
5 pany, the person has the right to
6 receive upon dissolution, or has
7 contributed, not less than 25 per-
8 cent of the capital.

9 “(iii) ELIGIBLE PRIVATELY HELD
10 COMPANY.—

11 “(I) IN GENERAL.—The term ‘el-
12 igible privately held company’ means a
13 privately held company that—

14 “(aa) does not have any
15 class of securities registered, or
16 required to be registered, with
17 the Commission under section 12
18 or with respect to which the com-
19 pany files, or is required to file,
20 periodic information, documents,
21 and reports under subsection (d);
22 and

23 “(bb) in the fiscal year end-
24 ing immediately before the fiscal
25 year in which the services of an

1 M&A broker are initially engaged
2 with respect to a securities trans-
3 action, the company, as deter-
4 mined in accordance with the his-
5 torical financial accounting
6 records of the company—

7 “(AA) before interest,
8 taxes, depreciation, and am-
9 ortization, has earnings in
10 an amount that is less than
11 \$25,000,000; or

12 “(BB) has gross reve-
13 nues in an amount that is
14 less than \$250,000,000.

15 “(II) ADJUSTMENT OF
16 AMOUNTS.—In addition to the adjust-
17 ments required under subparagraph
18 (F), the Commission may, by rule,
19 modify the dollar amounts described
20 in subclause (I) if the Commission de-
21 termines that such a modification is
22 necessary or appropriate in the public
23 interest or for the protection of inves-
24 tors.

1 “(iv) M&A BROKER.—The term ‘M&A
2 broker’ means a broker, and any person
3 associated with a broker, that is engaged
4 in the business of effecting securities
5 transactions solely in connection with the
6 transfer of ownership of an eligible pri-
7 vately held company, regardless of whether
8 the broker acts on behalf of a seller or
9 buyer, through the purchase, sale, ex-
10 change, issuance, repurchase, or redemp-
11 tion of, or a business combination involv-
12 ing, securities or assets of the eligible pri-
13 vately held company, if the broker reason-
14 ably believes that—

15 “(I) upon consummation of the
16 transaction, any person acquiring se-
17 curities or assets of the eligible pri-
18 vately held company, acting alone or
19 in concert, will control and, directly or
20 indirectly, will be active in the man-
21 agement of—

22 “(aa) the eligible privately
23 held company; or

1 “(bb) the business con-
2 ducted with the assets of the eli-
3 gible privately held company; and

4 “(II) if any person is offered se-
5 curities in exchange for securities or
6 assets of the eligible privately held
7 company, that person will, before be-
8 coming legally bound to consummate
9 the transaction, receive or have rea-
10 sonable access to—

11 “(aa) the most recent fiscal
12 year-end financial statements of
13 the issuer of the securities, as
14 customarily prepared by the man-
15 agement of the issuer in the nor-
16 mal course of operations; and

17 “(bb) if the financial state-
18 ments of the issuer are audited,
19 reviewed, or compiled—

20 “(AA) any related
21 statement by the inde-
22 pendent accountant;

23 “(BB) a balance sheet
24 dated not more than 120

1 days before the date of the
2 offer; and

3 “(CC) information per-
4 taining to the issuer’s man-
5 agement, business, material
6 loss contingencies, and, for
7 the period covered by those
8 financial statements, results
9 of operations.

10 “(v) SHELL COMPANY.—The term
11 ‘shell company’ means a company that, at
12 the time of a transaction with an eligible
13 privately held company—

14 “(I) has no or nominal oper-
15 ations; and

16 “(II) has—

17 “(aa) no or nominal assets;

18 “(bb) assets consisting solely
19 of cash and cash equivalents; or

20 “(cc) assets consisting of
21 any amount of cash and cash
22 equivalents and nominal other as-
23 sets.

24 “(B) GENERAL EXEMPTION.—Except as
25 provided in subparagraphs (C) and (D), an

1 M&A broker shall be exempt from registration
2 under this section.

3 “(C) EXCLUDED ACTIVITIES.—An M&A
4 broker shall not be eligible for an exemption
5 under this paragraph if the M&A broker does
6 any of the following:

7 “(i) Directly or indirectly, in connec-
8 tion with the transfer of ownership of an
9 eligible privately held company, receives,
10 holds, transmits, or has custody of the
11 funds or securities to be exchanged by the
12 parties to the transaction.

13 “(ii) Engages on behalf of an issuer in
14 a public offering of any class of securities
15 that is registered, or is required to be reg-
16 istered, with the Commission under section
17 12 or with respect to which the issuer files,
18 or is required to file, periodic information,
19 documents, and reports under subsection
20 (d).

21 “(iii) Engages on behalf of any party
22 in a transaction involving a shell company,
23 other than a business combination related
24 shell company.

1 “(iv) Directly, or indirectly through
2 any affiliate of the M&A broker, provides
3 financing relating to the transfer of owner-
4 ship of an eligible privately held company.

5 “(v) Assists any party in obtaining fi-
6 nancing from an unaffiliated third party
7 without—

8 “(I) complying with all other ap-
9 plicable laws in connection with that
10 assistance, including, if applicable,
11 part 220 of title 12, Code of Federal
12 Regulations; and

13 “(II) disclosing any compensation
14 in writing to the party.

15 “(vi) Represents both the buyer and
16 the seller in the same transaction with-
17 out—

18 “(I) providing clear written dis-
19 closure with respect to the parties the
20 broker represents; and

21 “(II) obtaining written consent
22 from both parties to the joint rep-
23 resentation.

24 “(vii) Facilitates a transaction with a
25 group of buyers formed with the assistance

1 of the M&A broker to acquire the eligible
2 privately held company.

3 “(viii)(I) Engages in a transaction in-
4 volving the transfer of ownership of an eli-
5 gible privately held company to a passive
6 buyer or group of passive buyers.

7 “(II) For purposes of subclause (I), a
8 buyer that is actively involved in managing
9 the acquired company described in that
10 subclause may not be construed to be a
11 passive buyer, without regard to whether
12 that buyer is owned by passive beneficial
13 owners.

14 “(ix) Binds a party to a transfer of
15 ownership of an eligible privately held com-
16 pany.

17 “(D) DISQUALIFICATIONS.—An M&A
18 broker shall not be eligible for an exemption
19 under this paragraph if the broker is subject
20 to—

21 “(i) suspension or revocation of the
22 registration of the broker under paragraph
23 (4);

24 “(ii) a statutory disqualification de-
25 scribed in section 3(a)(39);

1 “(iii) a disqualification under the
 2 rules adopted by the Commission under
 3 section 926 of the Investor Protection and
 4 Securities Reform Act of 2010 (15 U.S.C.
 5 77d note); or

6 “(iv) a final order described in para-
 7 graph (4)(H).

8 “(E) RULE OF CONSTRUCTION.—Nothing
 9 in this paragraph may be construed to limit any
 10 other authority of the Commission to exempt
 11 any person, or any class of persons, from any
 12 provision of—

13 “(i) this title; or

14 “(ii) any rule or regulation issued
 15 under this title.

16 “(F) INFLATION ADJUSTMENT.—

17 “(i) IN GENERAL.—On the date that
 18 is 5 years after the date of enactment of
 19 the Small Business Mergers, Acquisitions,
 20 Sales, and Brokerage Simplification Act of
 21 2018, and every 5 years thereafter, each
 22 dollar amount in subparagraph
 23 (A)(iii)(I)(bb) shall be adjusted by—

24 “(I) dividing the annual value of
 25 the Employment Cost Index For

1 Wages and Salaries, Private Industry
2 Workers (or any successor index), as
3 published by the Bureau of Labor
4 Statistics, for the calendar year pre-
5 ceding the calendar year in which the
6 adjustment is being made by the an-
7 nual value of such index (or suc-
8 cessor) for the calendar year ending
9 December 31, 2012; and

10 “(II) multiplying that dollar
11 amount by the quotient obtained
12 under subclause (I).

13 “(ii) ROUNDING.—Each dollar
14 amount determined under clause (i) shall
15 be rounded to the nearest multiple of
16 \$100,000.”.

17 **SEC. 3. EFFECTIVE DATE.**

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

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