

116TH CONGRESS
1ST SESSION

H. R. 609

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 HOUSE OF REPRESENTATIVES

JANUARY 16, 2019

Mr. HUIZENGA (for himself, Mr. POSEY, and Mr. HIGGINS of New York) introduced the following bill; which was referred to the Committee on Financial Services

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 2019”.

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) IN GENERAL.—Except as provided in
9 subparagraph (B), an M&A broker shall be ex-
10 empt from registration under this section.

11 “(B) EXCLUDED ACTIVITIES.—An M&A
12 broker is not exempt from registration under
13 this paragraph if such broker does any of the
14 following:

15 “(i) Directly or indirectly, in connec-
16 tion with the transfer of ownership of an
17 eligible privately held company, receives,
18 holds, transmits, or has custody of the
19 funds or securities to be exchanged by the
20 parties to the transaction.

21 “(ii) Engages on behalf of an issuer in
22 a public offering of any class of securities
23 that is registered, or is required to be reg-
24 istered, with the Commission under section
25 12 or with respect to which the issuer files,
26 or is required to file, periodic information,

1 documents, and reports under subsection
2 (d).

3 “(iii) Engages on behalf of any party
4 in a transaction involving a shell company,
5 other than a business combination related
6 shell company.

7 “(iv) Directly, or indirectly through
8 any of its affiliates, provides financing re-
9 lated to the transfer of ownership of an eli-
10 gible privately held company.

11 “(v) Assists any party to obtain fi-
12 nancing from an unaffiliated third party
13 without—

14 “(I) complying with all other ap-
15 plicable laws in connection with such
16 assistance, including, if applicable,
17 Regulation T (12 C.F.R. 220 et seq.);
18 and

19 “(II) disclosing any compensation
20 in writing to the party.

21 “(vi) Represents both the buyer and
22 the seller in the same transaction without
23 providing clear written disclosure as to the
24 parties the broker represents and obtaining

1 written consent from both parties to the
2 joint representation.

3 “(vii) Facilitates a transaction with a
4 group of buyers formed with the assistance
5 of the M&A broker to acquire the eligible
6 privately held company.

7 “(viii) Engages in a transaction in-
8 volving the transfer of ownership of an eli-
9 gible privately held company to a passive
10 buyer or group of passive buyers. For pur-
11 poses of the preceding sentence, a buyer
12 that is actively involved in managing the
13 acquired company is not a passive buyer,
14 regardless of whether such buyer is itself
15 owned by passive beneficial owners.

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

19 “(C) DISQUALIFICATIONS.—An M&A
20 broker is not exempt from registration under
21 this paragraph if such broker is subject to—

22 “(i) suspension or revocation of reg-
23 istration under paragraph (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 “(D) RULE OF CONSTRUCTION.—Nothing
9 in this paragraph shall be construed to limit
10 any other authority of the Commission to ex-
11 empt any person, or any class of persons, from
12 any provision of this title, or from any provision
13 of any rule or regulation thereunder.

14 “(E) DEFINITIONS.—In this paragraph:

15 “(i) BUSINESS COMBINATION RE-
16 LATED SHELL COMPANY.—The term ‘busi-
17 ness combination related shell company’
18 means a shell company that is formed by
19 an entity that is not a shell company—

20 “(I) solely for the purpose of
21 changing the corporate domicile of
22 that entity solely within the United
23 States; or

24 “(II) solely for the purpose of
25 completing a business combination

1 transaction (as defined under section
2 230.165(f) of title 17, Code of Fed-
3 eral Regulations) among one or more
4 entities other than the company itself,
5 none of which is a shell company.

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

13 “(I) is a director, general part-
14 ner, member or manager of a limited
15 liability company, or corporate officer
16 of a corporation or limited liability
17 company, and exercises executive re-
18 sponsibility (or has similar status or
19 functions);

20 “(II) has the right to vote 25
21 percent or more of a class of voting
22 securities or the power to sell or direct
23 the sale of 25 percent or more of a
24 class of voting securities; or

1 “(III) in the case of a partner-
2 ship or limited liability company, has
3 the right to receive upon dissolution,
4 or has contributed, 25 percent or
5 more of the capital.

6 “(iii) ELIGIBLE PRIVATELY HELD
7 COMPANY.—The term ‘eligible privately
8 held company’ means a privately held com-
9 pany that meets both of the following con-
10 ditions:

11 “(I) The company does not have
12 any class of securities registered, or
13 required to be registered, with the
14 Commission under section 12 or with
15 respect to which the company files, or
16 is required to file, periodic informa-
17 tion, documents, and reports under
18 subsection (d).

19 “(II) In the fiscal year ending
20 immediately before the fiscal year in
21 which the services of the M&A broker
22 are initially engaged with respect to
23 the securities transaction, the com-
24 pany meets either or both of the fol-
25 lowing conditions (determined in ac-

1 cordance with the historical financial
2 accounting records of the company):

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

7 “(bb) The gross revenues of
8 the company are less than
9 \$250,000,000.

10 For purposes of this subclause, the
11 Commission may by rule modify the
12 dollar figures if the Commission deter-
13 mines that such a modification is nec-
14 essary or appropriate in the public in-
15 terest or for the protection of inves-
16 tors.

17 “(iv) M&A BROKER.—The term ‘M&A
18 broker’ means a broker, and any person
19 associated with a broker, engaged in the
20 business of effecting securities transactions
21 solely in connection with the transfer of
22 ownership of an eligible privately held com-
23 pany, regardless of whether the broker acts
24 on behalf of a seller or buyer, through the
25 purchase, sale, exchange, issuance, repur-

1 chase, or redemption of, or a business com-
2 bination involving, securities or assets of
3 the eligible privately held company, if the
4 broker reasonably believes that—

5 “(I) upon consummation of the
6 transaction, any person acquiring se-
7 curities or assets of the eligible pri-
8 vately held company, acting alone or
9 in concert, will control and, directly or
10 indirectly, will be active in the man-
11 agement of the eligible privately held
12 company or the business conducted
13 with the assets of the eligible privately
14 held company; and

15 “(II) if any person is offered se-
16 curities in exchange for securities or
17 assets of the eligible privately held
18 company, such person will, prior to
19 becoming legally bound to consum-
20 mate the transaction, receive or have
21 reasonable access to the most recent
22 fiscal year-end financial statements of
23 the issuer of the securities as custom-
24 arily prepared by the management of
25 the issuer in the normal course of op-

1 erations and, if the financial state-
2 ments of the issuer are audited, re-
3 viewed, or compiled, any related state-
4 ment by the independent accountant,
5 a balance sheet dated not more than
6 120 days before the date of the offer,
7 and information pertaining to the
8 management, business, results of op-
9 erations for the period covered by the
10 foregoing financial statements, and
11 material loss contingencies of the
12 issuer.

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

17 “(I) has no or nominal oper-
18 ations; and

19 “(II) has—

20 “(aa) no or nominal assets;

21 “(bb) assets consisting solely
22 of cash and cash equivalents; or

23 “(cc) assets consisting of
24 any amount of cash and cash

1 equivalents and nominal other as-
2 sets.

3 “(F) INFLATION ADJUSTMENT.—

4 “ (i) IN GENERAL.—On the date that
5 is 5 years after the date of the enactment
6 of this paragraph, and every 5 years there-
7 after, each dollar amount in subparagraph
8 (E)(iii)(II) shall be adjusted by—

9 “ (I) dividing the annual value of
10 the Employment Cost Index For
11 Wages and Salaries, Private Industry
12 Workers (or any successor index), as
13 published by the Bureau of Labor
14 Statistics, for the calendar year pre-
15 ceding the calendar year in which the
16 adjustment is being made by the an-
17 nual value of such index (or suc-
18 cessor) for the calendar year ending
19 December 31, 2012; and

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

23 “ (ii) ROUNDING.—Each dollar
24 amount determined under clause (i) shall

1 be rounded to the nearest multiple of
2 \$100,000.”.

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

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

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