

117TH CONGRESS
1ST SESSION

S. 3391

To amend the Securities Exchange Act of 1934 to establish a registration exemption for merger and acquisition brokers, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 14, 2021

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 establish a registration exemption for merger and acquisition brokers, and for other purposes.

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 2021”.

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

3 (a) IN GENERAL.—Section 15(b) of the Securities
 4 Exchange Act of 1934 (15 U.S.C. 78o(b)) is amended by
 5 adding at the end the 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 related shell company’
 12 means a shell company that is formed by
 13 an entity that is not a shell company solely
 14 for the 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, or any successor
 22 regulation) among not less than 1 en-
 23 tity other than the company itself,
 24 none of which is a shell company.

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 subclause (I), there shall
9 be a presumption of control if, upon
10 completion of a transaction, a buyer
11 or group of buyers—

12 “(aa) has the right to vote
13 25 percent or more of a class of
14 voting securities or the power to
15 sell or direct the sale of 25 per-
16 cent or more of a class of voting
17 securities; or

18 “(bb) in the case of a part-
19 nership or limited liability com-
20 pany, has the right to receive
21 upon dissolution, or has contrib-
22 uted, 25 percent or more of the
23 capital.

24 “(iii) ELIGIBLE PRIVATELY HELD
25 COMPANY.—The term ‘eligible privately

1 held company' means a privately held com-
2 pany that meets both of the following con-
3 ditions:

4 “(I) The company does not have
5 any class of securities—

6 “(aa) registered, or required
7 to be registered, with the Com-
8 mission under section 12; or

9 “(bb) with respect to which
10 the company files, or is required
11 to file, periodic information, doc-
12 uments, and reports under sub-
13 section (d).

14 “(II)(aa) In the fiscal year end-
15 ing immediately before the fiscal year
16 in which the services of an M&A
17 broker are initially engaged with re-
18 spect to a securities transaction, the
19 company meets either of the following
20 conditions (determined in accordance
21 with the historical financial account-
22 ing records of the company):

23 “(AA) The earnings of the
24 company before interest, taxes,

1 depreciation, and amortization
2 are less than \$25,000,000.

3 “(BB) The gross revenues
4 of the company are less than
5 \$250,000,000.

6 “(bb) For purposes of this sub-
7 clause, the Commission may, by rule,
8 modify the dollar figures in subitem
9 (AA) or (BB) of item (aa) if the Com-
10 mission determines that such a modi-
11 fication is necessary or appropriate in
12 the public interest or for the protec-
13 tion of investors.

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

1 the eligible privately held company, if the
2 broker reasonably believes that—

3 “(I) upon consummation of the
4 transaction, any person acquiring se-
5 curities or assets of the eligible pri-
6 vately held company, acting alone or
7 in concert—

8 “(aa) will control the eligible
9 privately held company or the
10 business conducted with the as-
11 sets of the eligible privately held
12 company; and

13 “(bb) directly or indirectly,
14 will be active in the management
15 of the eligible privately held com-
16 pany or the business conducted
17 with the assets of the eligible pri-
18 vately held company, including
19 without limitation, by—

20 “(AA) electing execu-
21 tive officers;

22 “(BB) approving the
23 annual budget;

1 “(CC) serving as an ex-
2 ecutive or other executive
3 manager; or

4 “(DD) carrying out
5 such other activities as the
6 Commission may, by rule,
7 determine to be in the public
8 interest; and

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

16 “(aa) the most recent fiscal
17 year-end financial statements of
18 the issuer of the securities, as
19 customarily prepared by the man-
20 agement of the issuer in the nor-
21 mal course of operations; and

22 “(bb) if the financial state-
23 ments of the issuer are audited,
24 reviewed, or compiled—

1 “(AA) any related
2 statement by the inde-
3 pendent accountant;

4 “(BB) a balance sheet
5 dated not more than 120
6 days before the date of the
7 offer; and

8 “(CC) information per-
9 taining to the management,
10 business, results of oper-
11 ations for the period covered
12 by the foregoing financial
13 statements and material loss
14 contingencies of the issuer.

15 “(v) SHELL COMPANY.—The term
16 ‘shell company’ means a company that, as
17 of the date of a transaction with an eligible
18 privately held company—

19 “(I) has no or nominal oper-
20 ations; and

21 “(II) has—

22 “(aa) no or nominal assets;

23 “(bb) assets consisting solely
24 of cash and cash equivalents; or

1 “(cc) assets consisting of
2 any amount of cash and cash
3 equivalents and nominal other as-
4 sets.

5 “(B) EXEMPTION.—Except as provided in
6 subparagraph (C), an M&A broker shall be ex-
7 empt from registration under this section.

8 “(C) EXCLUDED ACTIVITIES.—An M&A
9 broker is not exempt from registration under
10 this paragraph if the M&A broker does any of
11 the following:

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

18 “(ii) Engages on behalf of an issuer in
19 a public offering of any class of securi-
20 ties—

21 “(I) that is registered, or is re-
22 quired to be registered, with the Com-
23 mission under section 12; or

24 “(II) with respect to which the
25 issuer files, or is required to file, pe-

1 riod information, documents, and re-
2 ports under subsection (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 lating to the transfer of ownership of an
10 eligible 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 part 220 of title 12, Code of Federal
18 Regulations, or any successor regula-
19 tions; and

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

22 “(vi) Represents both the buyer and
23 the seller in the same transaction with-
24 out—

1 “(I) providing clear written dis-
2 closure with respect to the parties the
3 broker represents; and

4 “(II) obtaining written consent
5 from both parties to the joint rep-
6 resentation.

7 “(vii) Facilitates a transaction with a
8 group of buyers formed with the assistance
9 of the M&A broker to acquire the eligible
10 privately held company.

11 “(viii) Engages in a transaction in-
12 volving the transfer of ownership of an eli-
13 gible privately held company to a passive
14 buyer or group of passive buyers.

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

18 “(D) DISQUALIFICATION.—An M&A
19 broker is not exempt from registration under
20 this paragraph if the M&A broker (and, as ap-
21 plicable, any officer, director, member, man-
22 ager, partner, or employee of the M&A
23 broker)—

24 “(i) has been barred from association
25 with a broker or dealer by the Commission,

1 any State, or any self-regulatory organiza-
2 tion; or

3 “(ii) is suspended from association
4 with a broker or dealer.

5 “(E) RULE OF CONSTRUCTION.—Nothing
6 in this paragraph may be construed to limit any
7 other authority of the Commission to exempt
8 any person, or any class of persons, from any
9 provision of this title, or from any provision of
10 any rule or regulation thereunder.

11 “(F) INFLATION ADJUSTMENT.—

12 “(i) IN GENERAL.—On the date that
13 is 5 years after the date of enactment of
14 this paragraph, and every 5 years there-
15 after, each dollar amount in subparagraph
16 (A)(iii)(II)(aa) shall be adjusted by—

17 “(I) dividing the annual value of
18 the Employment Cost Index For
19 Wages and Salaries, Private Industry
20 Workers (or any successor index), as
21 published by the Bureau of Labor
22 Statistics, for the calendar year pre-
23 ceding the calendar year in which the
24 adjustment is being made by the an-
25 nual value of such index (or suc-

1 cessor) for the calendar year ending
2 December 31, 2020; and

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

6 “(ii) ROUNDING.—Each dollar
7 amount determined under clause (i) shall
8 be rounded to the nearest multiple of
9 \$100,000.”.

10 (b) EFFECTIVE DATE.—The amendments made by
11 subsection (a) shall take effect on the date that is 90 days
12 after the date of enactment of this Act.

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