

[Excerpt - Division AA Financial Services Matters
Title V—Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification]

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—117th Cong., 2d Sess.

H.R. 2617

To amend section 1115 of title 31, United States Code, to amend the description of how performance goals are achieved, and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by _____

Viz:

1 In lieu of the matter proposed to be inserted by the

2 House in Senate amendment 4, insert the following:

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the “Consolidated Appro-

5 priations Act, 2023”.

6 SEC. 2. TABLE OF CONTENTS.

Sec. 1. Short title.

Sec. 2. Table of contents.

Sec. 3. References.

Sec. 4. Explanatory statement.

Sec. 5. Statement of appropriations.

2726

1

DIVISION AA—FINANCIAL

2

SERVICES MATTERS

17 **TITLE V—SMALL BUSINESS**
18 **MERGERS, ACQUISITIONS,**
19 **SALES, AND BROKERAGE SIM-**
20 **PLIFICATION**

21 **SEC. 501. REGISTRATION EXEMPTION FOR MERGER AND**
22 **ACQUISITION BROKERS.**

23 (a) IN GENERAL.—Section 15(b) of the Securities
24 Exchange Act of 1934 (15 U.S.C. 78o(b)) is amended by
25 adding at the end the following:

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

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

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

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

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

24 “(iii) Engages on behalf of any party
25 in a transaction involving a shell company,

2756

1 other than a business combination related
2 shell company.

3 “(iv) Directly, or indirectly through
4 any of its affiliates, provides financing re-
5 lated to the transfer of ownership of an eli-
6 gible privately held company.

7 “(v) Assists any party to obtain fi-
8 nancing from an unaffiliated third party
9 without—

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

15 “(II) disclosing any compensation
16 in writing to the party.

17 “(vi) Represents both the buyer and
18 the seller in the same transaction without
19 providing clear written disclosure as to the
20 parties the broker represents and obtaining
21 written consent from both parties to the
22 joint representation.

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

2757

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

3 “(viii) 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 “(ix) Binds a party to a transfer of
8 ownership of an eligible privately held com-
9 pany.

10 “(C) DISQUALIFICATION.—An M&A broker
11 is not exempt from registration under this para-
12 graph if such broker (and if and as applicable,
13 including any officer, director, member, man-
14 ager, partner, or employee of such broker)—

15 “(i) has been barred from association
16 with a broker or dealer by the Commission,
17 any State, or any self-regulatory organiza-
18 tion; or

19 “(ii) is suspended from association
20 with a broker or dealer.

21 “(D) RULE OF CONSTRUCTION.—Nothing
22 in this paragraph shall be construed to limit
23 any other authority of the Commission to ex-
24 empt any person, or any class of persons, from

2758

1 any provision of this title, or from any provision
2 of any rule or regulation thereunder.

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

4 “(i) BUSINESS COMBINATION RE-
5 LATED SHELL COMPANY.—The term ‘busi-
6 ness combination related shell company’
7 means a shell company that is formed by
8 an entity that is not a shell company—

9 “(I) solely for the purpose of
10 changing the corporate domicile of
11 that entity solely within the United
12 States; or

13 “(II) solely for the purpose of
14 completing a business combination
15 transaction (as defined under section
16 230.165(f) of title 17, Code of Fed-
17 eral Regulations) among one or more
18 entities other than the company itself,
19 none of which is a shell company.

20 “(ii) CONTROL.—The term ‘control’
21 means the power, directly or indirectly, to
22 direct the management or policies of a
23 company, whether through ownership of
24 securities, by contract, or otherwise. There
25 is a presumption of control if, upon com-

2759

1 pletion of a transaction, the buyer or group
2 of buyers—

3 “(I) has the right to vote 25 per-
4 cent or more of a class of voting secu-
5 rities or the power to sell or direct the
6 sale of 25 percent or more of a class
7 of voting securities; or

8 “(II) in the case of a partnership
9 or limited liability company, has the
10 right to receive upon dissolution, or
11 has contributed, 25 percent or more
12 of the capital.

13 “(iii) ELIGIBLE PRIVATELY HELD
14 COMPANY.—The term ‘eligible privately
15 held company’ means a privately held com-
16 pany that meets both of the following con-
17 ditions:

18 “(I) The company does not have
19 any class of securities registered, or
20 required to be registered, with the
21 Commission under section 12 or with
22 respect to which the company files, or
23 is required to file, periodic informa-
24 tion, documents, and reports under
25 subsection (d).

2760

1 “(II) In the fiscal year ending
2 immediately before the fiscal year in
3 which the services of the M&A broker
4 are initially engaged with respect to
5 the securities transaction, the com-
6 pany meets either or both of the fol-
7 lowing conditions (determined in ac-
8 cordance with the historical financial
9 accounting records of the company):

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

14 “(bb) The gross revenues of
15 the company are less than
16 \$250,000,000.

17 For purposes of this subclause, the
18 Commission may by rule modify the
19 dollar figures if the Commission deter-
20 mines that such a modification is nec-
21 essary or appropriate in the public in-
22 terest or for the protection of inves-
23 tors.

24 “(iv) M&A BROKER.—The term ‘M&A
25 broker’ means a broker, and any person

2761

1 associated with a broker, engaged in the
2 business of effecting securities transactions
3 solely in connection with the transfer of
4 ownership of an eligible privately held com-
5 pany, regardless of whether the broker acts
6 on behalf of a seller or buyer, through the
7 purchase, sale, exchange, issuance, repur-
8 chase, or redemption of, or a business com-
9 bination involving, securities or assets of
10 the eligible privately held company, if the
11 broker reasonably believes that—

12 “(I) upon consummation of the
13 transaction, any person acquiring se-
14 curities or assets of the eligible pri-
15 vately held company, acting alone or
16 in concert—

17 “(aa) will control the eligible
18 privately held company or the
19 business conducted with the as-
20 sets of the eligible privately held
21 company; and

22 “(bb) directly or indirectly,
23 will be active in the management
24 of the eligible privately held com-
25 pany or the business conducted

2762

1 with the assets of the eligible pri-
2 vately held company, including
3 without limitation, for example,
4 by—

5 “(AA) electing execu-
6 tive officers;

7 “(BB) approving the
8 annual budget;

9 “(CC) serving as an ex-
10 ecutive or other executive
11 manager; or

12 “(DD) carrying out
13 such other activities as the
14 Commission may, by rule,
15 determine to be in the public
16 interest; and

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

2763

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

15 “(v) SHELL COMPANY.—The term
16 ‘shell company’ means a company that at
17 the time 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

2764

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

5 “(F) INFLATION ADJUSTMENT.—

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

11 “(I) dividing the annual value of
12 the Employment Cost Index For
13 Wages and Salaries, Private Industry
14 Workers (or any successor index), as
15 published by the Bureau of Labor
16 Statistics, for the calendar year pre-
17 ceding the calendar year in which the
18 adjustment is being made by the an-
19 nual value of such index (or suc-
20 cessor) for the calendar year ending
21 December 31, 2020; and

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

2765

1 “(ii) ROUNDING.—Each dollar
2 amount determined under clause (i) shall
3 be rounded to the nearest multiple of
4 \$100,000.”.

5 (b) EFFECTIVE DATE.—This section and any amend-
6 ment made by this section shall take effect on the date
7 that is 90 days after the date of enactment of this Act.