H.R. 2274
SMALL BUSINESS MERGERS, ACQUISITIONS, SALES, AND BROKERAGE SIMPLIFICATION ACT OF 2013

A Bill to Reduce Regulatory Costs and Burdens on the Sale of Privately Owned Businesses

- An estimated $10 trillion of privately owned businesses will be sold or closed as baby boomers retire.
- Jobs are preserved and created when new entrepreneurs acquire and grow existing businesses.
- Business brokers play a critical role in facilitating private business mergers, acquisitions, and sales.
- Simplified regulation of business brokerage services will reduce costs and better protect business owners.

Right-sizing Federal Securities Regulation of M&A Brokers

H.R. 2274 has been introduced in the U.S. House of Representatives to reduce the regulatory costs incurred by the buyers and sellers of smaller privately held companies for professional business brokerage services, while enhancing their protection through well defined, appropriately scaled, and cost effective federal securities regulation of merger and acquisition (*M&A*) intermediaries and business brokers (*M&A brokers*). If enacted, this legislation would create a simplified system of registration through a public notice filing with the Securities and Exchange Commission (*SEC*), and would require appropriate client disclosures, pertaining to M&A brokers and their associates. H.R. 2274 would also direct the SEC to tailor its rules governing M&A brokers in light of the limited scope of their activities, the nature of privately negotiated M&A transactions, and the active involvement of buyers and sellers in those transactions.

Important investor protections would be preserved. Federal law would continue to control the capital, custody, margin, financial responsibility, recordkeeping, bonding, and financial or operational reporting requirements applicable to M&A brokers, tailored by the SEC to their circumstances. Statutory disqualifications would continue to apply. The SEC, in coordination with state securities regulators, would establish the content of the notice registration and disclosures, and could establish uniform and consistent standards of training, experience, competence, and qualifications for the associates of M&A brokers, presently prescribed by the Financial Industry Regulatory Authority (*FINRA*). M&A brokers would be exempt from membership in and regulation by FINRA. Existing state securities laws would continue to apply.

Being SEC-registered, an M&A broker could exchange client referrals with fully-registered broker-dealers, thus better assuring that small business clients could be cost-effectively served by appropriately regulated brokers. M&A brokers could not have custody of the funds or securities exchanged by the parties. An M&A broker could not be involved in capital-raising beyond the context of M&A transactions and could not be engaged by an issuer in a public offering of its securities.

Current Securities Regulation of Business Brokerage Services

Professional business brokerage services are critically important to the liquidity of small business ownership, business growth, and related jobs creation. M&A brokers introduce business buyers and sellers, help to prepare and value the business for sale, assist with the pre-purchase investigation process, advise about the terms and structure of the sale, and help the parties close their transactions. Very small business sales are usually accomplished as a purchase of business's assets for cash, which is generally not subject to securities regulation. However, when ownership is transferred by a purchase/sale, exchange, or issuance of stock or debt, or a merger or business combination transaction, then federal and state securities laws apply to the parties, the transaction, and regulate the activities of the M&A broker.

Securities laws require M&A brokers to be registered and regulated as a "broker-dealer" by the SEC, FINRA, and one or more states—just like Wall Street investment bankers buying or selling publicly traded securities. However, M&A brokers and the private sellers/buyers they serve operate in vastly different circumstances. In private M&A transactions the parties are typically represented by lawyers in negotiating transaction agreements prescribing their contractual rights and remedies to protect their interests. Buyers are often larger businesses or sophisticated private equity groups. Buyers perform their own pre-purchase due diligence investigation and will run or control the acquired business after closing. Larger transactions involve more lawyers, accountants, and commercial lenders. These significant "investor protections" are inherent in private M&A transactions. These smaller transactions cannot support the high costs of regulatory compliance incurred by an M&A broker to be in practice regardless of the number of securities-regulated transactions handled by the broker.

The cost of complying with existing broker-dealer regulatory requirements is substantial and is necessarily passed on to the business sellers and buyers who use the M&A broker's services. Minimum transaction fees charged by registered broker-dealers often begin at $500,000 and go higher. Smaller business owners cannot afford to use fully-registered broker-dealers. Instead, they often turn to lower-cost unregistered brokers operating in violation of securities laws or simply forego these professional services. Under some circumstances, the business sale may itself be put at risk of a buyer's later lawsuit to rescind and unwind the transaction because the seller used an unregistered broker.

A proposal to appropriately scale federal regulation of business brokers has been among the top recommendations in the 2006, 2007, 2008, 2009, 2010, and 2011 Government-Industry Forum on Small Business Capital Formation hosted by the SEC (http://sec.gov/info/smallbus/sbforum.shtml). The Final Report of the Advisory Committee [*to the SEC*] on Smaller Public Companies (2006), made same recommendation (www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf), as did the Report and Recommendations of the Private Placement Broker-Dealer Task Force of the Business Law Section of the American Bar Association, 60 *Business Lawyer* 959-1028 (2005) (www.sec.gov/info/smallbus/2009gbforum/abareport062005.pdf). Since 2006, the Alliance of Mergers & Acquisition Advisors (AM&AA), supported by the International Business Brokers Association and 14 other professional associations, has been cooperatively working with the SEC Division of Trading and Markets staff and state securities regulators to formulate a solution through rulemaking, but in more than six years the SEC has not made this small business issue a priority. A solution is urgently needed to help small businesses.

Urgent Need for Legislative Action

Support H.R. 2274 to reduce regulatory costs and burdens on private business sales by "right-sizing" federal securities regulation of M&A brokers. H.R. 2274 is attached. Additional background information is available upon request.

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113th CONGRESS

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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.

IN THE HOUSE OF REPRESENTATIVES

June 6, 2013

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

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A BILL

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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

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

SEC. 2. MERGER AND ACQUISITION BROKERS.

(a) In General- 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) MERGER AND ACQUISITION BROKERS-

'(A) REGISTRATION BY NOTICE-FILING- Notwithstanding paragraphs (1) and (2), an M&A broker may register for purposes of this section by filing with the Commission an electronic notice in such form and containing such information concerning the M&A broker and any persons associated with the M&A broker as the Commission may by rule prescribe as necessary or appropriate in the public interest or for the protection of investors.

‘(B) EFFECTIVENESS OF REGISTRATION-

‘(i) IMMEDIATE- Except as provided in clause (ii), the registration of an M&A broker under subparagraph (A) shall become effective upon receipt by the Commission of a properly completed notice from the M&A broker under such subparagraph.

‘(ii) COMMISSION APPROVAL REQUIRED- The registration of an M&A broker under subparagraph (A) shall not become effective without approval by the Commission if the M&A broker or a person associated with the M&A broker is subject to--

‘(I) suspension or revocation of registration under paragraph (4);

‘(II) a statutory disqualification (except that the date of the filing of the notice under subparagraph (A) shall be substituted for the date referred to in section 3(a)(39)(F)); or

‘(III) disqualification under the rules adopted by the Commission under section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 U.S.C. 77d note) (except that the date of the filing of the notice under subparagraph (A) shall be substituted for the date referred to in paragraph (2)(A)(ii) of such section).

‘(C) UPDATED INFORMATION- If the information contained in a notice filed under subparagraph (A) becomes inaccurate or incomplete in any material respect, the M&A broker shall update such information in a form and manner to be specified by the Commission.

‘(D) PUBLIC AVAILABILITY- The Commission shall make publicly available on the website of the Commission the information provided in a notice filed under subparagraph (A), as updated under subparagraph (C).

‘(E) DISCLOSURE TO CLIENTS- The Commission may require an M&A broker registered under subparagraph (A) to deliver to the clients of the M&A broker a disclosure document describing the M&A broker and the affiliates, associated persons, services, and fees of the M&A broker, any conflicts of interest of the M&A broker, and such other information as the Commission considers necessary or appropriate in the public interest or for the protection of investors.

‘(F) EXEMPTIONS FOR M&A BROKERS- To the extent that the activities of an M&A broker registered under subparagraph (A) are within the scope of the activities described in subparagraph (K)(iii), the M&A broker (and any persons associated with the M&A broker) shall be exempt from--

‘(i) except as provided in subparagraph (G), the requirements of this Act that apply to a broker registered, or required to be registered, under this subsection (or to any persons associated with such a broker, as the case may be); and

‘(ii) the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.).

‘(G) PROVISIONS APPLICABLE TO M&A BROKERS-

‘(i) IN GENERAL- The following provisions shall apply to an M&A broker registered under subparagraph (A) (or to any persons associated with the M&A broker, as the case may be):

‘(I) This paragraph and paragraphs (4), (5), (6), and (7).

‘(II) Subsection (a), paragraphs (1)(A) and (3)(A) of subsection (c), and subsection (g).

‘(III) Subsections (a)(1) and (b)(1) of section 17.

‘(ii) TAILORED APPLICATION- In applying subsection (c)(3)(A) of this section and subsections (a)(1) and (b)(1) of section 17 to M&A brokers, the Commission shall take into account the nature of the transactions in which M&A brokers are involved, the involvement of the parties to such transactions in such transactions, and the limited scope of the activities of M&A brokers under subparagraph (K)(iii), including that M&A brokers do not have custody of the funds or securities to be exchanged by the parties to such transactions.

‘(iii) STATE LAW PREEMPTION- Subsection (i)(1) shall govern the relationship between the requirements applicable to M&A brokers under this Act and the requirements applicable to M&A brokers under the law of a State or a political subdivision of a State. Except as provided in such subsection, this paragraph shall not preempt the law of a State or a political subdivision of a State applicable to M&A brokers.

‘(H) EXCLUDED ACTIVITIES- An M&A broker may not in reliance on this paragraph do any of the following:

‘(i) Directly or indirectly, in connection with the transfer of ownership of an eligible privately held company, receive, hold, transmit, or have custody of the funds or securities to be exchanged by the parties to the transaction.

‘(ii) Engage 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 section 15(d).

‘(I) COORDINATION WITH THE STATES- In establishing appropriate uniform and consistent standards of training, experience, competence, and other qualifications under paragraph (7) for persons associated with an M&A broker, and in prescribing the form and content of the notice described in subparagraph (A), the Commission shall cooperate, coordinate, and share information with any association composed of duly constituted representatives of State governments the primary assignment of which is the regulation of the securities business within such States.

‘(J) REGULATIONS- Not later than 180 days after the date of the enactment of this paragraph, the Commission shall promulgate regulations to--

‘(i) implement and enforce this paragraph; and

‘(ii) codify the interpretative guidance issued by the staff of the Commission in the no-action letter to International Business Exchange Corporation dated December 12, 1986, and in the no-action letter to Country Business, Inc., dated November 8, 2006, with respect to circumstances under which registration as a broker under this section is not required.

‘(K) 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 25 percent or more of a class of voting securities or the power to sell or direct the sale of 25 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, 25 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 section 15(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 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.

‘(L) INFLATION ADJUSTMENT-

‘(i) IN GENERAL- On the date that is 5 years after the Commission first promulgates final regulations under subparagraph (J), and every 5 years thereafter, each dollar amount in subparagraph (K)(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.’.

(b) Effective Date- Paragraph (13) of section 15(b) of the Securities Exchange Act of 1934, as added by subsection (a), except subparagraph (J) of such paragraph, shall take effect on the date that is 180 days after the date of the enactment of this Act.