

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/2009gforum/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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