June 28, 2018

Hon. Richard Shelby, Chairman
Appropriations Committee
United States Senate
Washington, D.C. 20515

Hon. Patrick Leahy, Co-Chairman
Appropriations Committee
United States Senate
Washington, D.C. 20515

Hon. James Lankford, Chairman
Financial Services & General Government
Subcommittee
United States Senate
Washington, D.C. 20515

Hon. Christopher Coons, Ranking Member
Financial Services & General Government
Subcommittee
United States Senate
Washington, D.C. 20515

Re: **Reconciling Senate FSGGA Act, 2019 (S. 3107) and House FSGGA Act, 2019 (H.R. [__]), Including Title IX, Subtitle C, the Small Business Mergers, Acquisitions, and Sales Brokerage Simplification Act (H.R. 477)**

Dear Senators Shelby, Leahy, Lankford, and Coons:

As you approach the reconciliation of the Senate Financial Services and General Government Appropriations Act, 2019 (S. 3107) (*Senate FSGG Act*) with the House Financial Services and General Government Appropriations Act, 2019 (H.R. [__]) (*House FSGG Act*), we respectfully ask that you support the final bill's inclusion of the House FSGG Act's **Title IX, Subtitle C, the Small Business Mergers, Acquisitions, and Sales Brokerage Simplification Act** *(M&A Brokers Bill;* as a stand-alone *H.R. 477)*, in the Conference Committee's recommendations for the final bill. As a stand alone bill, H.R. 477 ***UNANIMOUSLY passed (426 – 0)*** the U.S. House of Representatives on December 7, 2017. The identical legislative text is embodied in **Title IX, Subtitle C** of the House FSGG Act.

Together, our respective national professional organizations represent tens of thousands of merger and acquisition (*M&A*) advisors, intermediaries, and business brokers (together, *M&A brokers*) who serve hundreds of thousands of sellers and buyers of privately owned businesses in your home states and throughout the United States. We are supported by 15 state and regional associations of M&A Brokers. We believe Title IX, Subtitle C (H.R. 477) is critically important to retiring baby boomers seeking to sell—and not close—their privately owned businesses.

Title IX, Subtitle C (H.R. 477) would exempt M&A Brokers from federal *registration* as a "broker-dealer" for M&A transactions selling privately owned companies, while preserving, clarifying, and enhancing statutory protections for private business sellers and buyers. The result would be to make these professional services more widely and cost-effectively available to private business owners who, today, have only one choice—engage an SEC-registered, "Wall Street-type" investment banker to assist in selling or buying their companies.

The House floor statements by both Financial Services Committee Chair, Jeb Hensarling, and Ranking Member, Maxine Waters (https://www.congress.gov/crec/2017/12/07/CREC-2017-12-07-pt1-PgH9739.pdf) emphasized the ***importance of H.R. 477 to small businesses*** and extoled the bill as an ***extraordinary bipartisan collaboration***. This bill is not in any way related to long-contentious securities reform regulation; rather, it fixes a 30-year old unintended tangential consequence of a court ruling in 1985.

In the ***last three sessions*** of Congress, this bill and its predecessors have also received broad-based public policy support from:

- Securities and Exchange Commission (*SEC*) Division of Trading and Markets staff;

- North American Securities Administrators Association (*NASAA*);
- Fourteen states–to date–that have taken similar regulatory action by rule, order, or interpretation;
- U.S. Chamber of Commerce in testimony and written support;
- Association for Corporate Growth (ACG);
- Small Business and Entrepreneurship (SBE) Council;
- Heritage Foundation;
- Our three national M&A professional associations and business education foundation;
- Fifteen state and regional M&A professional associations; and
- Thousands of our members in all 50 states.

This legislation is predicated on ***more than a decade of industry and public input***. Recommendations to appropriately scale federal regulation of business brokers were among the top public recommendations in:

- 2006, 2007, 2008, 2009, 2010, and 2011 Government-Industry Forum on Small Business Capital Formation annually hosted by the SEC (https://www.sec.gov/info/smallbus/sbforumreps.htm);
- Final Report of the Advisory Committee [*to the SEC*] on Smaller Public Companies (2006) (https://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf); and
- 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) (https://www.sec.gov/info/smallbus/2009gbforum/abareport062005.pdf).

This bill addresses a "jobs issue" your home states. Hundreds of thousands of baby boomers are retiring every year—they need to *sell or close* their businesses. According to the latest data published by the U.S. Small Business Administration's Office of Advocacy, there are ***29.6 million small businesses employing 57.9 million employees, representing 99.9% of all United States businesses***. Baby boomers control privately owned companies representing over $10 *trillion* in business assets, according to published estimates. Millions of U.S. jobs are at stake in your states—jobs are preserved or created when small business ownership transfers and combinations are successfully accomplished and new owners continue operating and growing those business.

This bill addresses a "small business issue" in your home states. Privately owned businesses have no publicly reported "stock quotes". Their values are negotiated. Their values are enhanced when multiple prospective buyers compete in offering to acquiring them. M&A brokers routinely identify, vet, and inform prospective buyers about businesses for sale. Small business owners do not need expensive SEC-registered "Wall Street-type" investment bankers to do this—but that's their only choice today.

Once introduced, business sellers and prospective buyers negotiate price and terms, often with the assistance of M&A brokers and their own legal counsel. To obtain these services, today's "*one size fits all*" regulatory regime requires private business owners to engage an SEC-registered broker-dealer. This legislation clarifies and simplifies the law allowing M&A brokers to lawfully provide these professional services—more competition to provide these professional services provides more choices to benefit small business owners. Indeed, in some rural areas of the country "Wall Street-type" investment bankers are not available or not interested in selling small businesses for "small" fees—in their eyes.

"One sized" federal securities "broker-dealer" regulation hurts small business owners. Connecting privately owned business sellers with prospective buyers and guiding them through the complexities of their business sales requires cost-effective business brokerage services—it does not require the special expertise of investment bankers regulated under the Securities Exchange Act of 1934. The 1934 Act's regulatory regime was designed to protect ***passive*** investors in ***public*** companies whose stock is valued, reported, and traded on ***public stock exchanges***—that regulatory regime is irrelevant to private company sales between sellers and buyers who control and actively run these businesses.

Today's costs of compliance with federal broker-dealer regulation (triggered by SEC registration and required FINRA membership) are ultimately borne by the small business owners who engage M&A brokers' professional services. Initial and on-going ***costs of federal broker-dealer registration and compliance are conservatively estimated to be more than $150,000 and $75,000 annually—these are fixed costs regardless of the number—if any—of business sales transacted***. Business sales typically take months to complete, sometimes more than a year, and sometimes are never concluded. Smaller-sized M&A brokerage firms handle only a few transactions each year. Moreover, FINRA's new member application process takes six months to a year to complete. These fixed compliance costs and related regulatory hurdles create ***economic barriers to competition in business brokerage services***, which is why a few larger investment banking firms have expressed concerns with the size of transactions that would be allowable under this legislation—to handicap or obstruct their lower-cost competition.

This bill has been harmonized with the SEC M&A Brokers no-action letter and adds investors protections not found in the no-action letter. The SEC M&A Brokers no-action letter, January 31, 2014 (https://www.sec.gov/divisions/marketreg/mr-noaction/2014/ma-brokers-013114.pdf), was published *two weeks after* this bill's progenitor *unanimously* passed (422-0) the U.S. House in 2014. In developing its no-action letter, ***the SEC staff incorporated key terms and definitions from the bill***, which was provided to the staff the day the bill was introduced. Differences between the bill and the no-action letter that formerly existed (due to the timing of their respective developmental paths) have been resolved.

Moreover, like the SEC no-action letter, this bill only creates a statutory exemption from SEC broker-dealer *registration*, and ***does not change the statutory definition of a "broker"***—M&A Brokers remain subject to SEC jurisdiction, examination, investigation, and anti-fraud prohibitions. The bill's exemptive relief is predicated upon factual conditions in the SEC M&A Brokers no-action letter, including disqualifications for "bad actors". The bill adds investor protections not found in the SEC no-action letter.

The SEC M&A Brokers no-action letter does not change the law. The SEC M&A Brokers no-action letter culminates a ***30-year history of a dozen or more staff no-action letters taking similar no-action positions*** in a variety of fact-patterns—leading to public confusion over the basic question of whether broker-dealer registration is or is not required. While evidencing the SEC staff's long-held favorable views, these no-action letters are not legally binding on anyone—not even the Commission. Federal courts may or may not choose to give deference to those views. No-action letters are not promulgated like rules and can be unilaterally changed without prior public notice. This creates tremendous uncertainty to the M&A transaction parties and their M&A brokers, including risks a transaction could be unwound. The bill removes that uncertainty by amending the 1934 Act of incorporate the SEC staff's position.

State securities regulators support this federal legislation. NASAA has supported this legislation through three sessions of Congress. Further, NASAA adopted a "Model M&A Broker Rule" (http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/07/MA-Broker-Model-Rule-adopted-Sept-29-2015-corrected.pdf) drawn from prior iterations of this bill so as to *best harmonize federal and state securities laws* regulating M&A brokers. When state-adopted by legislation, rulemaking, or administrative order, the model rule exempts M&A brokers from *state-level* broker-dealer registration. In most states, real estate brokerage licensing continues to be required. To date, fourteen states—***Colorado, Florida, Georgia, Illinois, Iowa, Maryland, Michigan, Mississippi, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and Vermont***—have granted exemptive relief based on the NASAA model rule and/or the SEC M&A Brokers no-action letter and other states are actively considering similar regulatory action.

When the SEC, NASAA, U.S. Chamber of Commerce, SBE Council, Association for Corporate Growth, and The Heritage Foundation support it, why would SIFMA or large SEC-registered investment bankers oppose it? Simple—today's regulatory regime creates ***barriers to competition***. In the 114th Congress SIFMA submitted to the Senate Banking Committee a letter expressing certain concerns—not opposition. SIFMA's nominal concerns have all been addressed in the bill.

SIFMA's concern—too large a "size cap": In its 2014 comment letter SIFMA noted this legislation imposes caps on the size of the privately owned businesses that may be advised by M&A brokers. The bill provides an "eligible privately owned company" must *either* have (1) less than $25,000,000 in "earnings before interest, taxes, depreciation, and amortization (an accounting concept commonly called "*EBIDA*"); or (2) less than $250,000,000 in gross revenue, both based upon the target company's *actual* prior year-end financial statements. SIFMA observed these are "disparate metrics that can produce vastly different outcomes". SIFMA suggested that "at a minimum the gross-revenue threshold should be lowered substantially and the EBITDA test removed all together". SIFMA offered no rationale.

Response: ***SIFMA's concern has been eliminated from the bill***. The bill authorizes the SEC to review and modify the size caps through rulemaking if doing so would be in the public interest. The SEC's rulemaking process requires a cost-benefit analysis and considers public comments—this is an appropriate compromise. Importantly, the SEC M&A Brokers no-action letter ***contains no size caps whatsoever***, plainly evidencing the SEC staff's view that ***the size of the transaction is irrelevant***—size does not change the staff's assessment, balancing, and cost/benefit analysis of investor protection considerations in private business sales. Indeed, the larger the transaction, the greater the involvement of the parties' management teams, employees, lawyers, accountants, and sometimes commercial lenders in due diligencing, negotiating, documenting, and closing their private company M&A transactions.

Moreover, the legislation's two alternate size metrics were ***specifically designed to accommodate a wide range of industries, business models, and business economics*** that drive a seller's business's value and hence its sale price. Some businesses have higher gross revenues but lower profit margins (e.g., grocery stores) and some businesses have lower gross revenues but higher profit margins (e.g., jewelry stores). The bill's dual metrics are applied to a company's *actual* year-end financial accounting books and records so as to prevent manipulation. As most small businesses cannot afford audited financial statements, there is no audit requirement in the legislation.

Conclusion. More than a decade of our working closely and cooperatively with the SEC staff and NASAA, supported by the SEC staff's 30 years' experience with its "no action" position, we believe this legislation achieves a common-sense solution by incorporating the SEC's no-action position into the 1934 Act. As baby boomers retire, this legislation is ***urgently needed***. The U.S. House's ***unanimous recorded vote*** (426-0) on December 7th expresses both their concurrence and their ***100% bipartisan support***. Few bills ever enjoy such broad-based support.

We now respectfully request your support for Title IX, Subchapter C, in reconciling the Senate and House FSGG Acts for FY 2019. We are available by telephone and in person to provide written and oral testimony and background materials in support of this legislation. Please do not hesitate to contact us or our securities counsel, Shane Hansen, as indicated below.

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Enclosure – *Brief Legislative and Regulatory History*

cc: U.S. Senate Appropriations Committee Members (by email)

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Hon. Lamar Alexander
Hon. Susan Collins
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Hon. Roy Blunt
Hon. Jerry Moran
Hon. John Hoeven
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OUR ORGANIZATIONS

Alliance of Merger & Acquisition Advisors (AM&AA) and its Members

The Alliance of Merger & Acquisition Advisors (AM&AA or The Alliance) is an international professional association of M&A intermediaries and related professionals. The Alliance serves the educational and transactional support needs of middle market M&A professionals worldwide. The Alliance was formed in 1998 to connect M&A intermediaries, CPAs, attorneys, and other experienced corporate financial investors and advisors, and currently has more than 900 professionals that are among the most highly recognized leaders in the industry. The Alliance draws upon proven capital resources combined with a think-tank of transactional expertise to better serve the many business investment needs of middle market companies worldwide. Some members are registered broker-dealers and others are unregistered in reliance upon SEC no-action letters and a variety of state-level transactional exemptions.

Members serve corporate and institutional sellers and buyers of privately held businesses with a wide range of transaction values. These essential corporate financial advisory and transaction services include investment banking, business brokerage, accounting, finance, valuation, tax law, and due diligence.

More information about AM&AA is available on its website at: http://www.amaaonline.com.

International Business Brokers Association (IBBA) and its Members

The International Business Brokers Association promotes members' professional development and interests to maximize public awareness of the business brokering profession. The IBBA supports entrepreneurship, and the concept that the investment risks of owning a business deserve a straightforward,

professional and honest presentation to both seller and buyer. The IBBA's Standards and Code of Ethics impose obligations beyond those of ordinary commerce. We believe business brokers should be zealous in maintaining and improving ethical practices and sharing with their fellow business brokers a common responsibility for integrity and honor in their business transactions.

More information about IBBA is available on their website at: http://www.ibba.org.

M&A Source (MAS) and its Members

The M&A Source is organized and operated to promote members' professional development to better serve their clients' needs, and to maximize public awareness of services performed by intermediaries and ancillary advisors who facilitate solutions available for lower middle market merger and acquisition transactions.

The M&A Source was established in 1992 to address the challenges faced by merger and acquisition professionals. This international organization currently has more than 300 M&A dealmakers including intermediaries, investment bankers, attorneys, accountants, financial planners and others involved in the M&A process.

The goals of the M&A Source are: (1) To advance the members' deal making opportunities, (2) To advance the profession's practice standards by providing a wide array of programs, and (3) To advance each member's personal growth potential through a variety of forums whereby members exchange information and learn from one another.

In addition, there are specific professional duties outlined for M&A Source members. They include: (1) Represent clients in accomplishing the sale of all or part of their businesses, (2) Represent clients searching to acquire companies, divisions or product lines, (3) Advise clients on the current values, structures, strategies and methods for ownership transfers of middle market companies, (4) Facilitate the array of financing necessary to consummate the transaction, and (5) Preserve client confidentiality and transaction details.

More information about M&A Source is available on their website at: http://www.masource.org.

Business Intermediaries Education Foundation (BIEF)

The Business Intermediaries Education Foundation is a non-profit organization founded with the mission of creating and enabling activities to uplift the profession through, but not limited to: (1) Information, (2) Awareness, (3) Research, (4) Outreach, (5) Analysis, (6) Exchange, (7) Understanding, (8) Cooperation, and (9) Education. The work of the BIEF is guided by a volunteer Board of Directors comprised of current and past chairs of the leading, international, business intermediary professional associations.

Specific objectives of the BIEF are: (1) Develop cooperation, education, and interchange among worldwide peers and with related professions; (2) Advise, educate, and persuade business buyers, sellers, and their advisors about the value and wisdom in employing a professional business broker or intermediary when selling, buying, or transferring ownership of a business; (3) Cause development and delivery of education and programs to enhance competencies and success throughout the business brokerage, mergers and acquisitions profession or its clientele; (4) Enable study and research into topics of value to the profession and its markets; (5) Establish perpetual self-funding to enable and sustain BEIF's vision and mission.

More information about BIEF is available on its website at: http://www.biefoundation.org.

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