



**What Business Brokers and M&A Advisors  
Need to Know About  
Federal & State Securities Laws  
Re: the Purchase /Sale of a Business**



**First and foremost...**

**Thank you!**



# First and foremost...Thank You...

... for all that you've already helped us accomplish...

- 2014 – SEC M&A Broker No Action Letter
- 2015 – NASAA Model State Rule
- 2016 – Florida M&A Broker Exemption

# **Partial List of Supporting Organizations**

## **National & International**

**Alliance of Merger & Acquisition Advisors (AM&AA)**

**Association for Corporate Growth (ACG)**

**Business Intermediaries Education Foundation (BIEF)**

**Institute of Certified Business Counselors (ICBC)**

**International Business Brokers Association (IBBA)**

**M&A Source (MAS)**

**Mid Market Alliance (MMA)**

**Small Business Investor Alliance (SBIA)**

**National Association of Media Brokers (NAMB)**

**North American Securities Administrators Association  
(NASAA)**

**US Chamber of Commerce**

**Small Business & Entrepreneurship (SBE) Council**

**The Heritage Foundation**



# **Partial List of Supporting Organizations Regional & Local**

**Midwest Business Brokers & Intermediaries (MBBI)**  
**Business Brokers of Florida (BBF)**  
**Colorado Association of Business Intermediaries (CABI)**  
**Mid Atlantic Business Intermediaries Association (MABIA)**  
**Texas Association of Business Brokers (TABB)**  
**California Association of Business Brokers (CABB)**  
**Arizona Business Brokers Association (AZBBA)**  
**Georgia Association of Business Brokers (GABB)**  
**Michigan Business Brokers Association (MBBA)**  
**Nevada Business Brokers Association (NBBA)**  
**Carolina's Virginia Business Brokers Association (CVBBA)**  
**New England Business Brokers Association (NEBBA)**  
**Pennsylvania Business Brokers Association (PBBA)**  
**Ohio Business Brokers Association (OBBA)**  
**Mid Atlantic Business Brokers Association (MABBA)**



# Presentation Outline

- **Background & The Need for Change**
- **Highlights of SEC MAB NAL**
- **Highlights of FL Statute FS 517.12(22)**
- **Status & Next Steps – Current Federal Legislation**
- **Contributing Your Fair Share**
- **Answering Your Questions**





# PART I

## Background & The Need for Change

# “Asset Sale” vs “Stock Sale” vs “Securities Transaction”

- Traditionally, business brokers – like accountants – tend to classify business sales as either Asset Sales or Stock Sales
- Typically, business brokers believe that only Stock Sales are subject to compliance with securities laws
- In reality, based on current federal and state securities laws, there is only one type of business sale transaction that is ALWAYS exempt from compliance with securities laws:
  - All Cash for Assets Sales



# The Inconvenient Truth...

## Under current federal & state securities laws...

- The sale of a business is always a securities transaction if...
  - It is a “stock” sale vs an “asset” sale;
  - It involves an exchange or issuance of stock in a merger;
  - It involves the issuance or exchange of stock for assets;
  - It involves the sale of stock to an ESOP.
  - It involves a fractional interest in the business.
- Furthermore...
  - An earn-out is presumed to be a security
  - A “Seller’s Note” is presumed to be a security unless it passes the “Reeves test.” (99% of all Sellers Notes will fail the Reeves test.)

# Who needs to register as a Broker-Dealer...

Registration is required by finders, **business brokers**, and **others engaged in these activities**:

- **Finding buyers and sellers of businesses** (i.e., activities relating to mergers and acquisitions where securities are involved);
- Finding investors for “issuers” (entities issuing securities), even in a “consultant” capacity;

<https://www.sec.gov/reportspubs/investor-publications/divisionsmarketregbdguidehtm.html>



# BOTTOM LINE:

- Under current federal law – and many state laws – in order to lawfully be compensated for facilitating the purchase /sale of a business involving securities, a business broker must:
  - Hold a current, active, state real estate license (15 states)
  - Register with the SEC as a securities broker
    - Become FINRA broker-dealer member, or affiliate with a FINRA broker dealer
    - Hold the required FINRA Classifications
    - Comply with all of the FINRA Rules & Regulations
  - Register as a securities broker /representative with your state's securities commission.



## **PART II**

# **Highlights of SEC MAB No Action Letter**



# Highlights of SEC MAB No Action Letter

- Issued January 28, 2014
- Only in the context of the purchase /sale of an ongoing, privately held business...
- SEC Staff will not recommend enforcement action against unregistered M&A Brokers (MABs) who meet certain conditions *regardless of the size of the transaction*
  - MAB does NOT have the power to bind parties to a deal
  - MAB does NOT hold either party's funds or securities
  - Post-closing, Buyer will be a "Control Person" (25% presumption of control)

# Other Conditions...

- M&A transaction will NOT involve a public offering of securities
  - M&A transaction will NOT result in transfer of securities to passive investor(s)
  - Any securities received by Buyer or MAB will be “restricted securities.”
  - MAB does NOT facilitate purchase /sale of a publicly traded shell company
  - MAB has NOT been previously barred from securities industry
  - MAB does NOT assist in the formation of a group of buyers
  - MAB does NOT directly or indirectly provide financing for the transaction
  - MAB must provide written disclosure and obtain written consent from all parties, if representing both Buyer and Seller
- **Anti-fraud prohibitions continue to apply**





# **PART III**

## **Highlights of North American Securities Administrators Assn (NASAA) Model State Rule**

# Ratified September 29, 2015...

- ...Persons who facilitate the sale of small, privately held businesses, regardless of deal structure, should be exempt from registering as securities broker-dealers with the state, provided they...
  - Do NOT raise capital,
  - Do NOT hold funds or securities, and
  - Do NOT invest funds for the accounts of others,
  - Do NOT have the power to bind either party to a transaction,
  - Do NOT facilitate the purchase /sale of a publicly traded shell,
  - Have NOT been “Bad Actors,” i.e., guilty of financial crimes, elsewhere
- **Anti-fraud prohibitions continue to apply**



## Other Limitations –

- “Target” company must have less than \$250M in revenues, or less than \$25M in EBITDA in its last fiscal year prior to engagement, and
- M&A Broker must “reasonably believe” that:
  - Buyer will be a “Control person” post-closing (20% presumption of control), and
  - The recipient of any securities did receive or have reasonable access to certain financial information from the issuer before being obligated to the transaction.

# Other Limitations – (cont'd)

**“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—

- Is a director, general partner, member or manager of a limited liability company, or officer exercising executive responsibility (or has similar status or functions);
- Has the right to vote 20 percent or more of a class of voting securities or the power to sell or direct the sale of 20 percent or more of a class of voting securities; or
- In the case of a partnership or limited liability company, has the right to receive upon dissolution, or has contributed, 20 percent or more of the capital



# Status State by State

As of this writing, the following states have adopted:

- A version of the NASAA Model State Exemption, or
- The SEC MAB NAL as their state enforcement policy

Alaska, Colorado, Florida,  
Georgia, Illinois, Iowa,  
Maryland, Michigan, Mississippi,  
Missouri, Pennsylvania, South Carolina,  
South Dakota, Texas, Utah, and  
Vermont



# **PART IV**

## **Status & Next Steps – Current Federal Legislation**



# Still need to pass HR 609, The Small Business Mergers, Acquisitions, Sales & Brokerage Simplification Act of 2019

- To codify the regulatory relief envisioned in the SEC MAB NAL, and
- To harmonize federal securities law & registration requirements with state law and registration requirements.
- As several securities attorney observed,  
*“...[the SEC MAB NAL] didn’t change the law. It simply says if you choose not to obey the law, the SEC will not recommend enforcement action.”*
- Until the SEC MAB NAL is codified into federal law, buyers, sellers and intermediaries still face the risk of rescission on their deals.

# Reaching Out to your US Senators is EASY!

**1. Go to this website:**

<https://bief.rallycongress.net/>

**2. Enter your zip code**

This website will determine who your US Senators are, and will email /mail them a prepared message, urging them to co-sponsor /support HR 609.





# **PART V**

## **Contributing Your Fair Share**

## All Right, You've Convinced Me. What Should I Do TODAY?

- Choose your level of support and make your credit card/ check/ pledge for your fair share TODAY
  - 2% Club Sponsor – 2% of Gross Success Fees**
  - 50% Club Sponsor – 50% of Out-of-Pocket Savings**
  - Angel Sponsor - \$50,000+**
  - Diamond Sponsor - \$25,000+**
  - Platinum Sponsor - \$15,000+**
  - Gold Sponsor – \$10,000 - \$19,999**
  - Silver Sponsor – \$5,000 - \$9,999**
  - Bronze Sponsor – \$2,500 - \$4,999**
  - 1000 Club Sponsor – \$1,000 - \$2,499**



# BIEF Campaign for Clarity Pledge Card

- *Yes, I want to support BIEF's Campaign for Clarity*
  - Please accept my enclosed contribution for \$\_\_\_\_\_.
  - Please accept my pledge for \$\_\_\_\_\_ to be paid on or before \_\_\_\_\_, 20\_\_.
  - Please accept my pledge for \$\_\_\_\_\_ to be paid from my proceeds of my next closing.

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Date**



# PART VI

## Answering Your Questions



# Contact Information

If you have questions about how to contribute financially, or with your time and resources, contact:

Mike Ertel, Co-Chair, (888) 864-6610,  
[mertel@transworldma.com](mailto:mertel@transworldma.com)

Jim Cornell, Co-Chair, (716) 675-6001 x 223,  
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John Johnson, Co-Chair, (918) 749-6016 +160,  
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Linda Purcell, Co-Chair, (847) 358-9404,  
[lpurcell@purcellasc.com](mailto:lpurcell@purcellasc.com)



# Other Resources

For more detailed information and for the latest updates visit these websites:

[www.biefoundation.org/](http://www.biefoundation.org/)

[www.amaaonline.org/legislation](http://www.amaaonline.org/legislation)

[www.ibba.org/resource-center/legal-updates/](http://www.ibba.org/resource-center/legal-updates/)

[www.masource.org/](http://www.masource.org/)