The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL:	SB 286
INTRODUCER:	Senator Brandes
SUBJECT:	Mergers and Acquisitions Brokers
DATE:	December 1, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	**Pre-meeting**
2.			AGG	
3.			FP	

I. Summary:

SB 286 creates an exemption from registration with the Office of Financial Regulation (OFR) for merger and acquisition (M&A) brokers facilitating the offer or sale of securities of eligible privately held companies. The bill also provides an exemption for these securities transactions that are conducted through a registered dealer or an M&A broker meeting certain requirements. Generally, an M&A broker, acting as an intermediary, engages in the business of transferring the ownership and control of a privately-held company through the sale of the business, which may be structured as an asset or securities transaction.

II. Present Situation:

Federal Regulation of Securities

Securities Act of 1933

The federal Securities Act of 1933 (Securities Act), requires every offer or sale of securities using the means and instrumentalities of interstate commerce to be registered with the U.S. Securities and Exchange Commission (SEC), unless an exemption is available. The Securities Act's emphasis on disclosure of important financial information through the registration of securities enables investors to make informed judgments about whether to purchase a company's securities. Investors who purchase securities and suffer losses have recovery rights if they can prove that there was incomplete or inaccurate disclosure of important information.

Securities Exchange Act of 1934

With the enactment of the Securities Exchange Act of 1934 (act), Congress created the Securities and Exchange Commission (SEC). The act provides the SEC with broad authority over all aspects of the securities industry. This includes the power to register, regulate, and oversee

brokerage firms, transfer agents, and clearing agencies as well as the nation's securities self-regulatory organizations (SROs).

The act also identifies and prohibits certain types of conduct in the markets and provides the SEC with disciplinary powers over regulated entities and persons associated with them. The act also authorizes the SEC to require periodic reporting of information by companies with publicly traded securities. Generally, any person acting as a "broker" or "dealer" as defined by Section 3(4), and 3(a)(5) of the Securities Exchange Act of 1934, respectively, must be registered with the SEC and join a SRO—the Financial Industry Regulatory Authority (FINRA), a national securities exchange, or both. Broker dealers must also comply with state laws relating to registration requirements.

In 2014, the SEC issued a no-action letter that defined "M&A Brokers" and outlined the activities that could be conducted and transactions that could be effected without requiring registration with the SEC under Section 15(a) of the Exchange Act. The SEC opined that it would not require M&A brokers to be registered as broker-dealers with the SEC when the M&A broker was a broker "…engaged in the business of effecting securities transactions solely in connection with the transfer of ownership and control of a privately-held company through the purchase, sale… involving securities or assets of the company to a buyer that will actively operate the company or the business conducted with the assets of the company."[1] Prior to the release of this no-action letter, it was unclear when an M&A Broker had to be registered with the SEC. The SEC no-action letter applies only to federal registration requirements.

Florida Regulation of Securities

In addition to federal securities laws, "Blue Sky Laws" are state laws that protect the investing public through registration requirements for both broker dealers and securities offerings, merit review of offerings, and various investor remedies for fraudulent sales practices and activities.[2] In Florida, the Securities and Investor Protection Act, chapter 517, F.S. (act), regulates securities issued, offered, and sold in the state of Florida. The Office of Financial Regulation (OFR) regulates and registers the offer and sale of securities in, to, or from Florida by firms, branch offices, and individuals affiliated with these firms in accordance with the act.[3]

The act prohibits dealers, associated persons, and issuers from offering or selling securities in this state unless registered with the OFR or specifically exempted.[4] Additionally, all securities in Florida must be registered with the OFR unless they meet one of the exemptions in s. 517.051 or s. 517.061, F.S., or are federally covered (i.e., under the exclusive jurisdiction of the SEC). Currently, mergers where two corporations have $500,000 or more in assets and where the sale price is $50,000 or more, are transactions that qualify for a securities registration exemption under s. 517.061(8), F.S. Similarly, mergers approved by the vote of the security holders are

[1] M&A Brokers, SEC No-Action Letter (January 31, 2014, revised February 4, 2014).
[2] U.S. Securities and Exchange Commission, *Blue Sky Laws*, http://www.sec.gov/answers/bluesky.htm (last visited November 22, 2015).
[3] Pursuant to s. 20.121(3)(a), F.S., the Financial Services Commission (the Governor and Cabinet) serves as the OFR's agency head for purposes of rulemaking and appoints the OFR's commissioner, who serves as the agency head for purposes of final agency action for all areas within the OFR's regulatory authority.
[4] Section. 517.12, F.S.

transactions that qualify for a securities registration exemption under s 517.061(9), F.S. Brokers who facilitate transactions through one of these two exemptions are currently exempt from registration by s. 517.12(2), F.S.

Failure to meet the requirements of these exemptions, can subject the issuer to civil, criminal, and administrative liability for the sale of unregistered securities, which is a third-degree felony in Florida.[5] Civil remedies under the act include rescission and damages.[6] In addition, issuers must comply with disclosure requirements in state and federal laws that provide potential investors with full and fair disclosures regarding the security.

Merger and Acquisition Brokers

M&A brokers may introduce buyers and sellers, help value the business, recommend terms and structure of the sale, and assist with negotiations in the closing sales of privately held businesses. Smaller transactions may involve the sale of the assets of the business in exchange for cash. However, the ownership of a business may be transferred by means of the purchase, sale, exchange, issuance, merger, repurchase, or redemption of, or other business combinations involving securities. If a transaction involves securities, then state and federal securities laws may apply to the parties and the transactions. The costs of complying with these broker-dealer regulatory requirements can be substantial, an estimated $150,000 initially and more than $75,000 annually. These regulatory costs are built into the final costs incurred by the small business sellers and buyers using services of an M&A broker.[7]

Prior to the adoption of the North American Association of Securities Administrators (NAASA) model rule, California, South Dakota, Texas, and Utah adopted limited broker-dealer or transaction-based exemptions. In September 2015, the NAASA adopted a model rule, which provides a uniform approach to state-level securities regulation and provides an exemption for M&A brokers if certain conditions are met.[8]

III. Effect of Proposed Changes:

The bill exempts the offer or sale of securities of an eligible privately held company through a registered dealer or through an M&A broker if certain conditions are met. The bill also exempts the M&A broker from registration with the OFR if certain conditions are met.

An eligible privately held company is a company that meets certain requirements:

- The company does not have any class of securities which is registered or required to be registered with the SEC, or for which the company is required to report with the SEC.

[5] Section 517.302(1), F.S.
[6] Section 517.211(3-5), F.S.
[7] Alliance of Merger and Acquisition Advisors and International Business Brokers Associations, M&A White Paper (April 29, 2015).
[8] The NASAA is a voluntary association whose membership consists of 67 state, provincial, and territorial securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico. The NASAA's Model Rule, Exempting Certain Merger & Acquisition Brokers from Registration, was adopted September 29, 2015.

- In the fiscal year immediately preceding the fiscal year during which the M&A broker begins to provide services for the securities transaction, the company has earnings before interest, taxes, depreciation, and amortization of less than $25 million or has gross revenues of less than $250 million.

The bill provides that an M&A Broker is a person that acts as a broker in carrying out securities transactions solely in connection with the transfer of ownership of eligible privately held companies. Further, the bill provides that the broker must reasonably believe that:

- After the completion of the transaction, any person who acquires securities or assets of the eligible privately held company will be the control person of the eligible privately held company. The bill defines the term, "control person."
- Any person that is offered securities in exchange for securities or assets of the eligible, privately held company will receive financial statements of the issuer prior to becoming legally bound to complete the transaction.

An M&A broker is exempt from registration *unless* the M&A broker has engaged in certain activities, such as:

- Holds, transmits, or has custody of the funds or securities to be exchanged by the parties;
- Engages on behalf of an issuer in a public offering of securities which are required to be registered with the SEC;
- Engages on behalf of an issuer in a public offering of securities for which the issuer is required to file certain documents pursuant to 15 U.S.C. s. 78o(d);
- Engages on behalf of any party in a transaction involving a public shell company;
- Is subject to a statutory disqualification under 15 U.S.C. s. 78c(a)(39);
- Is subject to a statutory disqualification under 15 U.S.C. 77d note; or
- Is subject to a final order described under 15 U.S.C. s. 78o(b) (4)(H).

The bill takes effect July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill would allow M&A brokers to be exempt from registration with the OFR if certain conditions are met, thereby reducing the regulatory burden and the costs of such transactions incurred by the buyers and sellers of such small businesses.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The final NASAA model rule was adopted subsequent to the filing of the Senate Bill. The Senate Bill does not contain all of the provisions of the model rule.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 517.061 and 517.12.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.