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 Appropriations Subcommittee on General Government

BILL:	CS/SB 286
INTRODUCER:	Banking and Insurance Committee and Senator Brandes
SUBJECT:	Merger and Acquisition Brokers
DATE:	January 12, 2016 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	**Fav/CS**
2.	Betta	DeLoach	AGG	**Recommend: Favorable**
3.			FP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 286 creates an exemption from registration with the Office of Financial Regulation (OFR) for a merger and acquisition (M&A) broker facilitating the offer or sale of securities in connection with the transfer of ownership of an eligible privately held company. 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. The bill also provides an exemption for the securities transactions that are conducted through an M&A broker if certain conditions are met.

The bill has an indeterminate insignificant fiscal impact.

The bill provides an effective date of July 1, 2016.

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, SEC staff issued a no-action letter stating that it would not recommend enforcement action to the SEC if an individual or firm meeting the definition of an "M&A Broker" were to effect transactions in connection with the transfer of ownership of a privately held company.[1] The no-action letter outlines the permissible activities and transactions that could be effected without requiring registration with the SEC as a broker dealer. In particular, the no-action letter permits an M&A broker to participate in the negotiations of the M&A transaction; advise the parties to issue securities, or otherwise to effect the transfer of the business by means of securities; or assess the value of any securities sold; and receive transaction-based or other compensation without registering as a dealer with the SEC." 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 is applicable 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, ch. 517, F.S. (act), regulates securities issued, offered, and sold in the state of Florida. The OFR regulates and registers the offer and

[1] M&A Broker Letter, SEC (January 31, 2014, revised February 4, 2014). For purposes of the letter, an "M&A Broker" is a person 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, exchange, issuance, repurchase, or redemption of, or a business combination 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.

[2] U.S. Securities and Exchange Commission, *Blue Sky Laws*, http://www.sec.gov/answers/bluesky.htm (last visited November 22, 2015).

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 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(3), F.S.

Failure to meet the requirements of these exemptions, can subject entities 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

An M&A broker 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 SEC and FINRA broker-dealer regulatory requirements can be substantial, an estimated $150,000 initially and more than $75,000 annually. These regulatory costs are included in 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 Securities Administrators Association, Inc. (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]

[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.
[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

III. Effect of Proposed Changes:

The bill provides that the offer or sale of securities solely in connection with the transfer of ownership of an eligible privately held company through an M&A broker is an exempt transaction under ch. 517, F.S., if certain conditions are met. However, these exempt transactions are subject to the prohibited practices and remedies under ss. 517.301, 517.311, and 517.312, F.S. The bill also exempts the M&A broker from registration with the OFR as a dealer if certain conditions are met.

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

- The company does not have any securities that require registration with the SEC or the OFR, or for which the company must submit filings with the SEC.
- 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 any broker and any person associated with a broker engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of eligible privately held companies. Further, the bill provides that prior to the completion of the securities transaction, the M&A broker must receive written assurances from the control person with the largest percentage of ownership for both the buyer and seller that:

- After the completion of the transaction, any person who acquires securities or assets of the eligible privately held company will be a control person of the eligible privately held company or will be a control person for the business conducted with the assets 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 of the securities offered in the exchange prior to becoming legally bound to complete the transaction.

An M&A broker is exempt from registration *unless* the M&A broker engages in certain activities or has engaged in disqualifying events, delineated below:

- 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 or the OFR;
- 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 suspension or revocation of registration under 15 U.S.C. s. 78o(b)(4);
- Is subject to a disqualification under 15 U.S.C. s. 78c(a)(39);
- Is subject to a disqualification under 15 U.S.C. s. 230.506(d); 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.

NASAA's Model Rule, Exempting Certain Merger & Acquisition Brokers from Registration, was adopted September 29, 2015.

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 exempt the sale of securities in connection with the transfer of ownership of a privately held eligible company and the registration of M&A brokers with the OFR if certain conditions are met. This would reduce the regulatory burden and the costs of such transactions incurred by the buyers and sellers of such small businesses.

C. Government Sector Impact:

The fiscal impact on state funds is indeterminate. The registration fees are currently deposited into the General Revenue Fund. The OFR estimates that there are under ten brokers/dealers currently paying the fee that totals under $2,000 annually.[9]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

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

[9] Information provided via a telephone conversation with the staff of the OFR on December 11, 2015.

IX. Additional Information:

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

CS by Banking and Insurance on December 1, 2015:
The CS provides technical, conforming changes to make the bill consistent with the provisions of the model act of the North American Securities Administrators Association and chapter 517, F.S.

B. Amendments:

None.