

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 Fiscal Policy

BILL: CS/CS/SB 286

INTRODUCER: Fiscal Policy Committee; Banking and Insurance Committee and Senator Brandes

SUBJECT: Merger and Acquisition Brokers

DATE: January 21, 2016

REVISED: _____

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 286 creates an exemption from registration with the Office of Financial Regulation 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 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 is effective July 1, 2016.

II. Present Situation:

Federal Regulation of Securities

Securities Act of 1933

The federal Securities Act of 1933 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 of 1933 emphasizes that the 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.¹

Securities Exchange Act of 1934

With the enactment of the Securities Exchange Act of 1934, Congress created the Securities and Exchange Commission (SEC). This act provides the SEC with broad authority over all aspects of the securities industry, including the power to register, regulate, and oversee brokerage firms, transfer agents, clearing agencies, and securities self-regulatory organizations (SROs).²

The Securities Exchange Act of 1934 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. It also authorizes the SEC to require periodic reporting of information by companies with publicly traded securities.³ Generally, any person acting as a “broker” or “dealer” as defined by Section 3(4) or 3(a)(5) of the Securities Exchange Act of 1934, respectively, must be registered with the SEC and join a SRO, like the Financial Industry Regulatory Authority (FINRA) or a national securities exchange. Broker dealers must also comply with state laws relating to registration requirements.⁴

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.⁵ In Florida, the Securities and Investor Protection Act, ch. 517, F.S., (act), regulates securities issued, offered, and sold in the state. 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 associated with these firms in accordance with the act.⁶

The act prohibits dealers, associated persons, and issuers from offering or selling securities in this state unless registered with the OFR or specifically exempted.⁷ 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).

¹ U.S. Securities and Exchange Commission, The Laws that Govern the Securities Industry, *Securities Act of 1933*, (October 2013), available at <https://www.sec.gov/about/laws.shtml> (last visited January 15, 2016).

² U.S. Securities and Exchange Commission, The Laws that Govern the Securities Industry, *Securities Exchange Act of 1934*, (October 2013), available at <https://www.sec.gov/about/laws.shtml> (last visited January 15, 2016).

³ *Id.*

⁴ U.S. Securities Exchange Commission, Investor Publications, Guide to Broker-Dealer Registration, (April 2008), available at <http://www.sec.gov/divisions/marketreg/bdguide.htm> (last visited January 15, 2016).

⁵ U.S. Securities and Exchange Commission, Fast Answers, *Blue Sky Laws*, available at <http://www.sec.gov/answers/bluesky.htm> (last visited January 15, 2016).

⁶ 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.

⁷ Section 517.12, F.S.

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. The criminal penalty for such a violation is a third degree felony.⁸ Civil remedies under the act include rescission and damages.⁹

Merger and Acquisition Brokers

A merger and acquisition (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 an estimated \$150,000 initially and more than \$75,000 annually. These regulatory costs are included in the final costs incurred by the business sellers and buyers using services of a M&A broker.¹⁰

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 a “M&A Broker” were to effect transactions in connection with the transfer of ownership of a privately held company.¹¹ 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 a M&A broker to participate in the negotiations of the M&A transaction; advise the parties to issue securities or to effect the transfer of the business by means of securities; 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.¹²

⁸ Section 517.302(1), F.S.

⁹ Section 517.211(3-5), F.S.

¹⁰ Alliance of Merger and Acquisition Advisors and International Business Brokers Associations, M&A White Paper (April 29, 2015).

¹¹ U.S. Securities and Exchange Commission, The Laws that Govern the Securities Industry, M&A Broker Letter, (January 31, 2014, revised February 4, 2014), available at <https://www.sec.gov/divisions/marketreg/mr-noaction/2014/ma-brokers-013114.pdf> (last visited January 15, 2016). 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. A no-action letter is limited to the facts presented in the request letter.

¹² *Id.*

The North American Securities Administrators Association, Inc., (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. In September 2015, the NASAA 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.¹³

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 a 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.

The bill provides that a “broker” has the same meaning as “dealer” as defined in s. 517.021(6), F.S. A “dealer” is defined to include:

- Any person, other than an associated person registered under this ch. 517, F.S., who engages, either for all or part of her or his time, directly or indirectly, as broker or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person; or
- Any issuer who through persons directly compensated or controlled by the issuer engages, either for all or part of her or his time, directly or indirectly, in the business of offering or selling securities which are issued or are proposed to be issued by the issuer.

An “eligible privately held company” is a company that meets the following requirements:

- The company does not have any class of securities which is registered or required to be registered with the SEC or the OFR, or for which the company files, or is required to file, summary and periodic information, documents, and reports 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, in accordance with its historical financial accounting records, has earnings before interest, taxes, depreciation, and amortization of less than \$25 million or has gross revenues of less than \$250 million.¹⁴

The bill requires that prior to the completion of the securities transaction, the M&A broker must receive written assurances from the control person¹⁵ with the largest percentage of ownership for both the buyer and seller that:

- After the transaction is completed, 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.

¹³ North American Securities Administrators Association, Regulatory & Legal Activities *Model Rule Exempting Certain Merger & Acquisition Brokers*, (Adopted September 29, 2015) available at <http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/07/MA-Broker-Model-Rule-adopted-Sept.-29-2015.pdf> (last visited January 15, 2016).

¹⁴ The amounts are required to be reviewed periodically starting July 1, 2021.

¹⁵ The bill defines 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:

- Directly or indirectly, in connection with the transfer of ownership of eligible privately held company, receives, holds, transmits, or has custody of the funds or securities to be exchanged by the parties of the transaction;
- Engages on behalf of an issuer in a public offering of any class of securities which is registered, or which is 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 files or is required to file, periodic information, documents, and reports with the SEC;
- Engages on behalf of any party in a transaction involving a public shell company;¹⁶
- 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 is effective 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.

¹⁶ The bill defines a “public shell company” to mean a company that, at the time of a transaction with an eligible privately held company, has: any class of securities which is registered, or which is required to be registered, with the SEC or the OFR or for which the company files, or is required to file, summary and periodic information, documents, and reports with the SEC; nominal or no operations; and nominal assets or no assets, assets consisting solely of cash and cash equivalents, or assets consisting of any amount of cash and cash equivalents and nominal other assets.

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 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 broker dealers currently paying the fee, for a total of under \$2,000 annually.¹⁷

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.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Fiscal Policy on January 20, 2016:

The CS changes the date that the net revenue threshold dollar amount must be adjusted to July 1, 2021.

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 rule of the North American Securities Administrators Association and ch. 517, F.S.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

¹⁷ Information provided via a telephone conversation between staff of the Appropriation Subcommittee on General Government and the OFR on December 11, 2015.