# S. 1923 – H.R. 2274
## THE SMALL BUSINESS MERGERS, ACQUISITIONS, SALES, AND BROKERAGE SIMPLIFICATION ACT

***A bill to amend the Securities Exchange Act of 1934 to exempt from registration brokers who provide services in connection with the transfer of ownership in smaller privately held companies***

- An estimated $10 trillion of privately owned businesses will be sold or closed as baby boomers retire.
- Jobs are preserved and created when new entrepreneurs acquire and grow existing businesses.
- Business brokers play a critical role in facilitating private business mergers, acquisitions, and sales.
- H.R. 2274 will reduce transaction costs ultimately borne by smaller business sellers and buyers.

## Summary and Status of S. 1923 – H.R. 2274

Business sellers and buyers commonly rely upon the professional services of merger and acquisition (*M&A*) intermediaries, advisors, and business brokers (*M&A brokers*) to help them sell or buy a business. H.R. 2274 is a bipartisan bill introduced on June 6, 2013, in the U.S. House of Representatives to clarify, simplify, and reduce regulatory costs associated with the purchase and sale of smaller privately held companies. **H.R. 2274 unanimously passed (422-0) the U.S. House of Representatives on January 14, 2014 and a bipartisan Senate companion bill, S. 1923,** are both pending before the U.S. Senate Committee on Banking, Housing, and Urban Affairs.

As introduced, H.R. 2274 was supported in testimony by the North American Securities Administrators Association (NASAA) and the U.S. Chamber of Commerce. During the bill's mark-up before the U.S. House Financial Services Committee, the Securities and Exchange Commission (*SEC*) asked that the bill be amended to create an exemption from "broker-dealer" registration for M&A brokers, rather than a simplified system of registration as had been initially proposed in the bill. The exemption would be self-effecting upon enactment and no SEC rulemaking would be required. As requested by the SEC, H.R. 2274 was unanimously amended, adopted, passed, and recommended by the Committee (57-0) to the full U.S. House of Representatives, where it unanimously passed and was referred to the U.S. Senate.

The broker-dealer registration exemption to be created by S. 1923 – H.R. 2274 would only apply to M&A transactions involving the sale of privately owned businesses with annual earnings of less than $25 million (that is, earnings before interest, taxes, depreciation, and amortization, commonly called EBITDA) and/or annual gross revenues of less than $250 million. The exemption would only apply where the buyer would, directly or indirectly, control and actively manage the business after the transaction closes.

Important existing investor protections would be unaffected by S. 1923 – H.R. 2274. Federal securities laws, including SEC jurisdiction to investigate and bring enforcement actions, and anti-fraud prohibitions, would continue to apply to M&A brokers. State regulation of securities, real estate, and business brokerage services would be unaffected. Unlike passive investors, business sellers control and actively manage the business, so they intimately understand what they are selling. Buyers conduct their own pre-purchase investigation; they will control and run the business they are buying. The parties are typically represented by legal counsel in structuring, negotiating, and closing M&A transactions. The parties primarily rely upon their negotiated contract rights for their protection, not securities laws or securities regulators. Accountants, commercial bankers, and other advisers are often involved. In larger transactions, the parties are experienced and sophisticated in running businesses and each have a management team.

## Business Brokerage Services – Public Policy Background

Professional business brokerage services are critically important to the liquidity of small business ownership, business growth, and related jobs preservation and creation. M&A brokers introduce business buyers and sellers, help to prepare and value the business, assist with the pre-purchase investigation process, advise about the terms and structure of the sale, and help the parties close their transactions. Very small business sales are usually accomplished as a purchase of business's assets for cash, which is generally not subject to securities regulation. However, when ownership is transferred by a purchase/sale, exchange, or issuance of stock or debt, or a merger or business combination transaction, then federal and state securities laws apply to the parties, the transaction, and regulate the activities of the M&A broker.

Today, securities laws require M&A brokers to be registered and regulated as a "broker-dealer" by the SEC, FINRA, and one or more states—just like Wall Street investment bankers buying or selling publicly traded securities. The cost of complying with existing broker-dealer regulatory requirements is substantial—commonly more than $150,000 initially and more than $75,000 annually—and those costs are necessarily passed on to the business sellers and buyers who use the M&A broker's services. Today, typical transaction fees charged by registered M&A brokers are expensive and often smaller communities are not well served by registered firms. Instead, smaller business owners often turn to lower-cost unregistered business brokers, who may be operating in violation of securities laws, or simply forego these professional services. Under some circumstances, the business sale may itself be put at risk of a buyer's later lawsuit seeking to rescind and unwind the transaction because the seller used an unregistered business broker.

A proposal to appropriately scale federal regulation of business brokers has been among the top recommendations in the 2006, 2007, 2008, 2009, 2010, and 2011 Government-Industry Forum on Small Business Capital Formation hosted by the SEC (http://sec.gov/info/smallbus/sbforum.shtml). The Final Report of the Advisory Committee [*to the SEC*] on Smaller Public Companies (2006), made same recommendation (www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf), as did the 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) (www.sec.gov/info/smallbus/2009gbforum/abareport062005.pdf). Since 2006, the Alliance of Mergers & Acquisition Advisors (AM&AA), supported by the International Business Brokers Association, M&A Source, and 16 other national and regional professional associations, has been cooperatively working with the SEC staff and state securities regulators to formulate a solution through rulemaking, but in more than seven years the SEC has not made this small business issue a rulemaking priority. As amended at the SEC's request, H.R. 2274 provides a solution to help owners of smaller businesses continue in operation, preserving and creating jobs throughout the U.S.

## Urgent Need for Legislative Action

**S. 1923 – H.R. 2274 would reduce regulatory costs and burdens on private business sales advised by M&A brokers**. Both bills, written testimony, and extensive background information are all available upon request.


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113TH CONGRESS
2D SESSION

# S. 1923

To amend the Securities Exchange Act of 1934 to exempt from registration brokers performing services in connection with the transfer of ownership of smaller privately held companies.

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IN THE SENATE OF THE UNITED STATES

JANUARY 14, 2014

Mr. MANCHIN (for himself and Mr. VITTER) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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# A BILL

To amend the Securities Exchange Act of 1934 to exempt from registration brokers performing services in connection with the transfer of ownership of smaller privately held companies.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the ''Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2014''.

**SEC. 2. REGISTRATION EXEMPTION FOR MERGER AND ACQUISITION BROKERS.**

Section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)) is amended by adding at the end the following:

''(13) REGISTRATION EXEMPTION FOR MERGER AND ACQUISITION BROKERS.—

''(A) IN GENERAL.—Except as provided in subparagraph (B), an M&A broker shall be exempt from registration under this section.

''(B) EXCLUDED ACTIVITIES.—An M&A broker is not exempt from registration under this paragraph if such broker does any of the following:

''(i) Directly or indirectly, in connection with the transfer of ownership of an eligible privately held company, receives, holds, transmits, or has custody of the funds or securities to be exchanged by the parties to the transaction.

''(ii) Engages on behalf of an issuer in a public offering of any class of securities that is registered, or is required to be registered, with the Commission under section 12 or with respect to which the issuer files, or is required to file, periodic information,

documents, and reports under subsection (d).

''(C) RULE OF CONSTRUCTION.—Nothing in this paragraph shall be construed to limit any other authority of the Commission to exempt any person, or any class of persons, from any provision of this title, or from any provision of any rule or regulation thereunder.

''(D) DEFINITIONS.—In this paragraph:

''(i) CONTROL.—The term '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—

''(I) is a director, general partner, member or manager of a limited liability company, or officer exercising executive responsibility (or has similar status or functions);

''(II) 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

''(III) 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.

''(ii) ELIGIBLE PRIVATELY HELD COMPANY.—The term 'eligible privately held company' means a company that meets both of the following conditions:

''(I) The company does not have any class of securities registered, or required to be registered, with the Commission under section 12 or with respect to which the company files, or is required to file, periodic information, documents, and reports under subsection (d).

''(II) In the fiscal year ending immediately before the fiscal year in which the services of the M&A broker are initially engaged with respect to the securities transaction, the company meets either or both of the fol-

lowing conditions (determined in accordance with the historical financial accounting records of the company):

"(aa) The earnings of the company before interest, taxes, depreciation, and amortization are less than $25,000,000.

"(bb) The gross revenues of the company are less than $250,000,000.

"(iii) M&A BROKER.—The term 'M&A broker' means a 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 an eligible privately held company, regardless of whether the broker acts on behalf of a seller or buyer, through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the eligible privately held company, if the broker reasonably believes that—

"(I) upon consummation of the transaction, any person acquiring se-

curities or assets of the eligible privately held company, acting alone or in concert, will control and, directly or indirectly, will be active in the management of the eligible privately held company or the business conducted with the assets of the eligible privately held company; and

''(II) if any person is offered securities in exchange for securities or assets of the eligible privately held company, such person will, prior to becoming legally bound to consummate the transaction, receive or have reasonable access to the most recent year-end balance sheet, income statement, statement of changes in financial position, and statement of owner's equity of the issuer of the securities offered in exchange, and, if the financial statements of the issuer are audited, the related report of the independent auditor, a balance sheet dated not more than 120 days before the date of the offer, and information

pertaining to the management, business, results of operations for the period covered by the foregoing financial statements, and material loss contingencies of the issuer.

''(E) INFLATION ADJUSTMENT.—

''(i) IN GENERAL.—On the date that is 5 years after the date of the enactment of the Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2014, and every 5 years thereafter, each dollar amount in subparagraph (D)(ii)(II) shall be adjusted by—

''(I) dividing the annual value of the Employment Cost Index For Wages and Salaries, Private Industry Workers (or any successor index), as published by the Bureau of Labor Statistics, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index (or successor) for the calendar year ending December 31, 2012; and

"(II) multiplying such dollar amount by the quotient obtained under subclause (I).

"(ii) ROUNDING.—Each dollar amount determined under clause (i) shall be rounded to the nearest multiple of $100,000.".

**SEC. 3. EFFECTIVE DATE.**

This Act and any amendment made by this Act shall take effect on the date that is 90 days after the date of the enactment of this Act.

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