BRIEF LEGISLATIVE AND REGULATORY HISTORY OF H.R. 477 (115TH) AND PREDECESSOR BILLS

The public policy underpinnings and regulatory dialog surrounding H.R. 477, *the Small Business Mergers, Acquisitions, Sales and Brokerage Simplification Act of 2017*, have more than a decade of regulatory review and discussion. Prior to developing proposed legislation for Congress, our industry-wide group supported by three national professional associations and 15 regional and state associations, started working closely with the Securities and Exchange Commission (*SEC*) staff. The following is a summary of this history. Electronic hypertext links are provided to relevant source materials.

From 2006 through 2012, initial efforts focused on developing a proposed SEC rule that would simplify current "broker-dealer" regulation by allowing merger and acquisition (*M&A*) advisors and business brokers (*M&A brokers*) to file a simplified, notice-only, form of registration with the SEC in connection with brokering the purchase or sale of privately-owned companies. Recommendations for the SEC's leadership and rulemaking to this end were among the top priorities published in the SEC's annual Government-Business Forums on Small Business Capital Formation in 2006, 2007, 2008, 2009, 2010, and 2011. Similar recommendations were made in the American Bar Association, Business Law Section, Private Placement Broker-Dealer Task Force Report published in 2005.

As a result of extensive Congressional mandates for SEC rulemaking, in late 2012 the SEC staff informally advised that, while sympathetic to our effort, the Commission did not have the "bandwidth" to commit staff and resources to formalizing a proposed rule, performing the required cost-benefit analysis, and undertaking the lengthy administrative rulemaking process. The SEC staff informally advised that our best hope would be to have Congress adopt a bill granting this relief from federal broker-dealer registration in facilitating the purchase/sale of privately owned businesses.

A similar dialog was commenced in 2006 with state securities regulators working with the North American Securities Administrators Association (*NASAA*). Harmonizing federal and state securities regulation of M&A brokers is critically important. In today's diverse U.S. economy many small business M&A transactions involve parties and interested prospects in multiple states. Public understanding and compliance with applicable regulatory requirements depends upon consistent standards for the regulated activities. A multiplicity of inconsistent federal and state regulations results in public confusion and substantial economic burdens on small businesses. Ultimately, this dialog produced NASAA's M&A Broker Model Rule, described below, which is predicated upon the text of Senate bill S. 1010 (114th), identical to H.R. 477 (115th) in this session.

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Both the SEC staff and NASAA representatives have been cooperative and supportive of these now protracted efforts.

First Congressional Session (113th)

With informal encouragement from the SEC staff, a proposed amendment to the Securities Exchange Act of 1934 (*1934 Act*) was drafted to create a simple, notice-only, registration filing system for M&A brokers (without FINRA membership). Ultimately, the SEC staff requested that the amendment be revised to create a self-executing exemption from federal broker-dealer registration with no filing requirements.

June 6, 2013—This bipartisan 1934 Act amendment was first introduced in the U.S. House of Representatives by Representatives Huizenga (MI-R) and Higgins (NY-D) as H.R. 2274, *the Small Business Mergers, Acquisitions, Sales and Brokerage Simplification Act of 2013* (113th). While clarifying and simplifying federal M&A broker regulation, this proposed amendment to the 1934 Act also included various "investor protection" features in the bill. Notably, these included requiring that privately negotiated business buyers acquire "control" and be actively involved in the management of the acquired business, not passive investors. Additionally, it included prohibitions against an M&A broker holding or handling funds or securities to be exchanged by the parties. As introduced, H.R. 2274 included a 25% ownership threshold as a presumptive threshold of acquired "control". The bill included size caps limiting qualifying privately owned target companies to those having: (1) less than $250,000,000 in revenues, and/or (2) less than $25,000,000 in earnings before interest, taxes, depreciation, and amortization (*EBITDA*) according to the company's historical financial accounting records. Moreover, the bill only created an exemption from broker-dealer *registration*, *not an exclusion* from the SEC's jurisdiction. The SEC retains full authority over M&A brokers and their activities under federal securities laws. H.R. 2274 was referred to the U.S. House Committee on Financial Services (*HFSC*).

As introduced, the bill also included two disqualifications. First, no person barred from the securities industry for being a "bad actor" could rely upon the M&A broker exemption (*Bad Actor Disqualification*). Similarly, the exemption could not be relied upon to broker a merger between a privately owned company and a "public shell company" (*Public Shell Company Merger Disqualification*), which in effect turns a private company into a public company without the scrutiny of SEC securities registration. While these two disqualifications were inadvertently deleted from the bill in the 113th session, the error was later discovered and both disqualifications are contained in H.R. 477.

During HFSC hearings on this bill, the following individuals /organizations testified and/or submitted written testimony in support of the bill:

- A. Heath Abshure, Arkansas Securities Commissioner and Immediate Past-President of NASAA, who testified in relevant part: *"…Investor protection is best served when regulatory necessity and transparency is balanced sensibly with the practicalities inherent in any business model. In the case of M&A brokers, H.R. 2274 strikes an appropriate balance. The bill reduces the standard regulatory requirements applicable to traditional broker-dealer firms and provides M&A brokers of privately held companies (as defined therein) with a simplified registration regime that provides sufficient oversight to these firms without diminishing the authority of state or federal regulators…"*

- Tom Quaadman, Vice President, Center for Capital Markets Competitiveness, speaking on behalf of the US Chamber of Commerce, which represents millions of small- and mid-sized businesses nationwide, testified in relevant part: *"…This is a common sense reform that should help entrepreneurs avail themselves of expert assistance in selling their business and realize the full value of their enterprise, thereby providing further incentives for aspiring entrepreneurs to push forward with their ideas. By facilitating M&A activity, it would provide another source of capital for smaller companies."*

- Alliance of M&A Advisors (*AM&AA*) gave extensive oral and written testimony on June 12 and October 23, 2013 in support of the bill on behalf of the industry-wide *Campaign for Clarity*, supported by more than 15 national, and regional professional associations of business brokers and M&A advisors.

November 14, 2013—House Financial Services Committee (*HFSC*) held a markup of H.R. 2274 (113th). At the "eleventh hour", late in the day before the bill was to be marked-up, we understand that the SEC staff advised the HFSC staff that after studying the bill's subject matter carefully for several years, the SEC concluded that there was not enough evidence of malfeasance involving these M&A-related activities to warrant the expense of separate broker-dealer registration, and the SEC would prefer the bill to provide for a self-executing exemption from SEC registration for M&A Brokers who met the bill's conditions. Without objection, the HFSC staff worked overnight to create an amendment in the nature of a substitute where the notice-filed registration provisions were deleted. In the rush, however, the HFSC staff inadvertently deleted the Bad Actors Disqualification and the Public Shell Merger Disqualification language that had been contained in those provisions. In the overnight rush this inadvertent deletion was not noticed and, as so amended, H.R. 2274 passed the HFSC UNANIMOUSLY in a recorded vote (57-0).

January 14, 2014—HFSC Report 113-326 on H.R. 2274 dated January 14, 2014, favorably reported H.R. 2274, as amended. H.R. 2274 then passed the full House UNANIMOUSLY, in a recorded vote (422-0). A bipartisan companion bill, S 1923, was introduced in the Senate by Senators Manchin (WV-D) and Vitter (LA-R) the same day.

January 31, 2014—Two weeks later, the Chief Counsel of the Division of Trading of the Securities and Exchange Commission released the M&A Broker No-Action Letter (*SEC M&A Broker NAL*), which concluded that the SEC staff would not recommend enforcement against an unregistered person who was engaged in facilitating a securities transaction solely related to the purchase/sale of a privately held company—*regardless of the size of the company*—provided its enumerated conditions were met. The SEC M&A Broker NAL included a 25% presumption of control provision, a threshold commonly used by the SEC in a variety of contexts. It is critically important to understand that an SEC no-action letter is only a staff *interpretation* and does not change the law; it is not legally binding on any person, not even the Commission, and may be withdrawn by the SEC staff at any time with or without prior notice. It is unrealistic and unreasonable to believe that M&A brokers—themselves small business owners—can build a successful professional services practice upon the potentially fleeting assurance of a "no-enforcement action" interpretive letter, or for the public to understand a no-action letter's limited import.

September 8, 2014—In a letter to the two original sponsors of S 1923, NASAA was generally supportive of the bill but noted that two important investor protection provisions originally included in H.R. 2274 (the Bad Actor Disqualification and the Public Shell Company Merger Disqualification) had been inadvertently omitted from the amended version of H.R. 2274, which prompted NASAA to withdraw its support of H.R. 2274 and S1923 without these two important investor protection provisions. The text of these two provisions was mistakenly deleted by the HFSC staff in responding to the belated SEC staff's request to remove the notice-filed registration-related provisions.

No action was ever taken on S. 1923 (113th) by the Senate Banking Committee.

Second Session (114th)

January 15, 2015—NASAA released an initial draft of its proposed model rule. *Notice of Request for Public Comment: Proposed NASAA Model Rule Exempting Certain Merger and Acquisition Brokers from State Registration*. The proposed model rule included the two inadvertently omitted investor protections (the Bad Actor Disqualification and the Public Shell Company Merger Disqualification). It also reduced from 25% to 20% the equity ownership threshold at

which "control" or a "significant influence" over a privately-held company is presumed. The lower 20% ownership threshold harmonizes the NASAA Model State Rule with two small business-related thresholds already widely in use:

(1) Under U.S. Generally Accepted Accounting Principles the "equity method of accounting" applies to investments in common stock (and "in-substance" common stock) when an equity owner has a "significant influence" over a company. Determining whether an owner has the "ability to exercise significant influence over operating and financial policies" is a facts and circumstances analysis. <u>"Significant influence" is presumed to exist for ownership of 20% or more</u> of the voting stock of a company and may be otherwise indicated in several ways such as representation on the board of directors or participation in policy-making processes. The ability of an investor to exercise significant influence over an investee is not necessarily precluded by the existence of a substantial or majority ownership of the voting stock by another owner. (see FASB Accounting Standards Codification 323—*Investments—Equity Method and Joint Ventures*).

(2) The U.S. Small Business Administration (*SBA*) loan guarantee program <u>requires a personal guarantee from each 20% or more equity owner</u> of a small business borrower. The SBA's loan guaranty threshold evidences the federal government's belief that a 20% equity owner exercises a substantial influence over a company and can obtain access to relevant information about the business, its financial condition, and its operations.

Feb 3, 2015—H.R. 686 (114th) was introduced with substantially the same text as H.R. 2274 (113th) because that bill had unanimously passed the U.S. House. H.R. 686. One minor change was the reduction from 25% to 20% the equity ownership threshold at which "control" or a "significant influence" over a privately-held company is presumed for the reasons noted above.

By reintroducing the same bill that had UNANIMOUSLY passed the U.S. House, its sponsor believed further hearings could be avoided, and the two inadvertently omitted disqualifications could be added back during its consideration in the U.S. Senate. The House could then concur with the expanded Senate version <u>with</u> the two disqualifications, and could then be sent to the President for signature.

April 16, 2015—NASAA solicited additional public comment on its proposed model rule. *Notice of Request for Additional Public Comment: Proposed NASAA Model Rule Exempting Certain Merger and Acquisition Brokers from State Registration*.

April 20, 2015—S. 1010 Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2015 (114th) was introduced with the two important investor protections added back (the Bad Actor Disqualification and the Public Shell Company Merger Disqualification), and with the threshold for a business buyer's "presumption of control" set at 20% ownership in view of the SBA and GAAP threshold for the reasons noted above.

April 29, 2015—HFSC conducted a hearing on H.R. 686, where Ms. Gayle Hughes, a Partner at Merion Investment Partners, testified that:

> *"We do a lot of business with small M&A and business brokers who are transacting mostly small private companies. They truly add value. A lot of those companies are very interested in dealing with the smaller firms. They are a little bit afraid of the larger, bigger houses and would far rather deal with the guy down the street who they have known for 20 years as they bring their company to market because it is their baby."*

Ms. Hughes testified further that:

> *"…providing relief for these M&A brokers will bolster middle market and lower-middle market M&A, which will lower costs for small and midsize companies seeking to unlock their value through a sale or engaging in a financing transaction for future growth."*

May 5, 2015—NASAA provided the Senate Banking Committee with its written support urging passage of S. 1010, as it once again included the Bad Actor Disqualification and the Public Shell Company Merger Disqualification.

Ultimately, however, no action was ever taken on S. 1010 (114th) by the Senate Banking Committee during the session.

May 20, 2015—The HFSC held a markup of H.R. 686. The markup's video archive (Part 1 at approximately 48:28 min.) records a proposed amendment offered by Representative Sherman. The amendment bears a draft date/time stamp of "May 19, 2015 (5:15p.m.)", the evening before the mark-up session. Rep. Sherman acknowledged it was not distributed to committee members prior to the beginning of the markup. Chairman Hensarling noted Rep. Sherman had not given the bill sponsor, other members, and their staffs an opportunity to review this proposed amendment ahead of the mark-up, noting that almost 15 months had elapsed since the virtually identical bill, H.R. 2274, had unanimously passed the Committee in the prior session. As a consequence, Rep. Sherman's proposed amendment was not adopted by the HFSC on a party-line vote. The content of this proposed amendment is specifically discussed below.

H.R. 686 was reported favorably out of committee to the full House on a mostly party-line vote. The bill was not taken up by the full House as a standalone bill because its sponsor had agreed with the Ranking Member and Representative Sherman not to do so until they had a chance to reconcile their differences. This never happened after several attempts.

September 29, 2015—NASAA adopted the model state rule creating a M&A broker exemption from comparable state broker-dealer registration (*NASAA M&A Broker Model Rule*) with language closely tracking the language in S. 1010, reflecting NASAA's affirmative steps to support the harmonization of federal and state securities regulation of M&A brokers.

NASAA's model rule has since been adopted in Illinois, Vermont, and is pending in Michigan and Rhode Island. Several states have issued interim no-action letters referencing the pending federal legislation and NASAA's model rule, and are awaiting Congressional action to harmonize their own state orders, rules, or final no-action letters, including Georgia, South Carolina, and Utah. Of special note, the 2016 Florida Legislature adopted the Florida M&A Broker Exemption based primarily on the on the NASAA Model State Rule and the SEC M&A Broker NAL, which became effective on July 1, 2016.

March 26, 2016—The text of H.R. 686 was included in a bill package, Title III of H.R. 1675, and H.R. 686's lead sponsor, Congressman Huizenga's amendments to Title III added back the inadvertently omitted "bad actor" and "public shell company" merger disqualifications, as well as other investor protections. As amended, the text of Title III of H.R. 1675 was made identical to the text of S. 1010 (which as noted above was supported by NASAA). While H.R. 1675 passed the U.S. House, no action was taken up in the Senate.

Sherman Amendment to H.R. 686

Inquiries have been posed about the substance of Rep. Sherman's proposed amendment to H.R. 686, belatedly distributed to the HFSC during H.R. 686's markup session. Most of that amendment's concepts are derived from the SEC M&A Broker NAL but, in fact, are substantively covered by H.R. 477 and NASAA's M&A Broker Model Rule. Each of the amendment's sections is summarized below, followed by a description of H.R. 477's related provisions.

1. Amendment page 1, line 1, Proposed Subsection (C)—*Disqualification for certain conduct*.

    Comment: Covered—the amendment's proposed text is completely covered by the far more expansive "bad actor" disqualification in

H.R. 477 and the NASAA M&A Broker Model Rule. The disqualification language in H.R. 477 is drawn from virtually verbatim from SEC Rule 506(d) pertaining to private securities offerings and additionally includes a statutory cross-reference requested by NASAA.

2. Amendment page 1, line 11, Subsection (D)—*Transactions involving Shell Companies Prohibited*.

   Comment: Covered—H.R. 477 includes an equally expansive but clearer and simpler disqualification language preventing use of this exemption from broker-dealer registration in mergers involving "public shell companies". H.R. 477's disqualification language is also contained in NASAA's M&A Broker Model Rule.

3. Amendment page 3, line 6, Subsection (E)—*Prohibiting Financing by M&A Brokers*.

   Comment: Covered—this prohibition is covered by language in H.R. 477 and the NASAA M&A Broker Model Rule that broadly prohibits an M&A broker from "[d]irectly 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." Transaction financing is prohibited by this language because those are the very funds to be exchanged in the transaction.

4. Amendment page 3, line 11, Subsection (F)—*Disclosure and Consent in Joint Brokerage Engagement*.

   Comment: Joint business brokerage engagements are unusual and are not permitted in most states. H.R. 477 is silent on this point because any scenario where a business seller and buyer both hire the same broker in the same transaction is very uncommon.

   Real estate brokerage licensing is required of business brokers in many states when the sale/transfer of real estate occurs in the transaction. A few states' real estate licensing laws may allow a real estate broker to be dually engaged by both the seller and buyer in the same transaction. However, state statutory or common law governing such a principal/agent relationship would typically require disclosure of an agent's conflicts of interest and/or any material information affecting that agent's duties to his or her principal. In other words, state laws generally assure that these disclosures will be made in the unusual scenario of a joint brokerage engagement.

5. <u>Amendment page 3, line 18, Subsection (G)—*Passive Buyers Prohibited*</u>.

   <u>Comment</u>: Covered—H.R. 477 and the NASAA M&A Broker Model Rule already require an eligible business buyer to acquire "control" and be actively involved in the management of the acquired business. This condition would be redundant and so could lead to public confusion.

6. <u>Amendment page 3, line 23, Subsection (H)—*No Authority to Bind a Party*</u>.

   <u>Comment</u>: The concern underlying this proposed prohibition in a privately negotiated M&A transaction is unknown. Presumably derives from the context of retail securities brokerage where a customer places a trade order with a broker to buy or sell passively-owned securities, typically accomplished through a stock market or exchange, and commonly in a matter of seconds or minutes. As agent, a retail stock broker may legally bind its principal/customer in a stock trade.

   M&A transactions are distinctly different than retail stock brokerage:

   - M&A transactions are privately negotiated between the business seller and buyer;
   - M&A transactions typically take several months between a purchase offer and closing;
   - M&A transactions are subject to extensive pre-closing due diligence by the buyer; and
   - Even in small M&A transactions both parties are commonly represented by legal counsel who prepare the transaction-related documents to convey ownership of the business.

   It would be extraordinary for either a seller or buyer to permit an M&A broker to sign legally binding contracts on its behalf.

7. <u>Amendment page 4, line 3, Subsection (I)—*Restricted Securities*</u>.

   <u>Comment</u>: Covered—As referenced in the proposed amendment, SEC Rule 147 already defines "restricted securities" and the related treatment of those securities under the Securities Act of 1933 (*1933 Act*) and related SEC rules. There is no reason to repeat the existing regulatory treatment of privately acquired securities under the 1933 Act in a broker-dealer registration exemption under the 1934 Act. This amendment is duplicable of existing regulation under the 1933 Act.

8. <u>Amendment page 4, line 9—Changes in the "control" percentages from 20% to 25%</u>.

   <u>Comment</u>: H.R. 477 uses a 20% equity ownership threshold to presume "control" of the target company because, as referenced above, longstanding Generally Accepted Accounting Principles, related accounting guidance and practices, as well as the SBA loan guarantee program, all use 20% (not 25%) ownership as the benchmark to presume when a business owner has "control" or "significant influence" over a business. It is also important to harmonize federal and state regulation of M&A brokers. Like H.R. 477, NASAA's M&A Broker Model Rule uses a 20% ownership threshold.

9. <u>Amendment page 4, line 9—Replacing the phrase "*active in the management*" with "*will actively operate*"</u>.

   <u>Comment</u>: The public policy concept underlying H.R. 477 and NASAA's M&A Broker Model Rule is that an acquiring buyer must not be a passive investor. The bill's current language makes it clear that a buyer's control of a business and involvement may be exercised through an active role in the management of the business, such as through an executive position and/or as a member of its board of directors. The proposed "actively operate" language could be too narrowly read to imply requiring day-to-day, front-line job responsibilities.

<u>Current Session (115th)</u>

January 12, 2017—H.R. 477 (115th) is a bipartisan small business bill reintroduced by Congressmen Huizenga, Posey, and Higgins. The bill's text is identical to S. 1010 (114th), upon which NASAA's M&A Broker Model Rule is predicated. H.R. 477 includes extensive investor protections notably including:

- A robust "Bad Actor" Disqualification drawn directly from SEC Rule 506(d) and including an additional provision requested by NASAA.

- A robust Public Shell Company Merger Disqualification. The investor protection this disqualification provides is to prevent mergers of private companies with and into "shell" public companies, thereby turning the private company into a "public company". These kinds of "public shell company" transactions have produced a history of investor frauds and so are excluded from H.R. 477's scope.

- H.R. 477 and NASAA's M&A Broker Model Rule both include a dollar-based cap limiting the size of an "eligible privately held company" to hav-

ing less than either $25 million in EBITDA or $250 million in gross revenue, both evidenced by the target company's prior-year financial statements. These dual caps accommodate target companies having different business models or operating in different industries. The SEC M&A Broker NAL contains no size caps whatsoever.

- H.R. 477 protects business sellers who receive a buyer's securities in an M&A transaction, such as in a stock-for-stock merger or exchange, by requiring the M&A broker to have a reasonable belief that the seller will receive material information about the buyer and its financial condition. The SEC M&A Broker NAL contains no such protections.

- An M&A broker may not have custody or possession of the funds or securities to be exchanged by the parties to an M&A transaction. This also prevents the M&A broker from providing transaction-related financing.

- An M&A broker may not engage on behalf of a securities issuer in a public offering of any class of securities.

- The bill only creates an exemption from SEC broker-dealer registration; in an M&A transaction involving the transfer or exchange of securities an M&A broker remains a "broker" under the 1934 Act, and so subject to the SEC's jurisdiction and generally applicable antifraud prohibitions in that Act.

- The public policy underpinnings of the bill are fully supported by the SEC staff, who issued the SEC M&A Broker NAL two weeks after this legislation first unanimously passed the U.S. House (422-0) in a recorded vote.

April 26 & 28, 2017—On behalf of NASAA, Mike Rothman, 2016-17 NASAA President and Minnesota Commissioner of Commerce, and Melanie Lubin, NASAA Board member and Maryland Securities Commissioner, provided testimony on various parts of the Financial CHOICE Act, a package of bills including the text of H.R. 477 as *Title IV*, *Subtitle A*, *Section 401*. NASAA's testimony strongly supported Title IV, Subsection 1, Section 401:

> *"Section 401 of the Financial Choice Act would establish an exemption from registration requirements under federal securities laws for persons serving as brokers in certain merger and acquisition deals ("M&A brokers"). State securities administrators share Congress's interest in establishing a more streamlined regulatory framework for persons serving as brokers in M&A deals that involve the transfer of securities, subject to certain conditions, including (1) the disqualification from the exemption of any broker or associated person who is a bad actor, or subject to suspension*

or revocation of registration; and (2) the inapplicability of the exemption to any M&A transaction where one party or more is a shell company. NASAA supported legislation identical to Section 401 when it was passed by the House as a provision of a broader legislative package in 2016 and continues to support the provision. We also note the federal exemption established by Section 401 closely mirrors a recently adopted NASAA Model Rule which exempts M&A brokers from state securities registration pursuant to certain conditions."

Next Steps—Serving Your Small Business Constituents

Currently, we are actively seeking:

- More House co-sponsors for H.R. 477, especially among those who serve on the House Financial Services Committee. Please see the "Dear Colleague" letter circulated by the lead sponsors, Cong. Huizenga, Higgins, and Posey.
- Original Senate sponsors, especially among those members of the Senate Banking Committee, to reintroduce and champion a new S. 1010 (114th) identical to H.R. 477.

More Information—Contacts

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