January 27, 2023

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Re: Petition for the SEC to Act Pursuant to H.R. 2617 and Modify Dollar Figures By Rule

Dear Ms. Countryman:

I respectfully petition the U.S. Securities and Exchange Commission (the "**SEC**") to act and modify, by rule, Title V of Division AA (Small Business Mergers, Acquisitions, Sales and Brokerage Simplification) pursuant to the Consolidated Appropriations Act of 2023 (H.R. 2617), (the "**Title V**").[1] Title V was signed into law on December 29, 2022, and becomes effective 90 days after enactment (*i.e.*, March 29, 2023). It is imperative that Title V is supported by the SEC's rulemaking and further guidance to both uphold the intent of the Title V as well as provide the necessary clarity that will continue to provide stability in the marketplace and protect the public.

Title V provides an exemption from securities broker registration for certain qualifying mergers and acquisitions ("**M&A**") brokers by adding a new subsection (13) to Section 15(b) of the Securities Exchange Act of 1934. Title V indicates that an M&A broker is not required to register as a broker with the SEC if such broker represents the buyer or seller in an M&A transaction of a privately held company, and such privately held company has gross revenues of less than $250 million, or an EBITDA of less than $25 million.

Specifically, I petition the SEC to modify the dollar threshold figures currently defining an M&A broker eligible for the exemption to prevent significant and unintended consequences from impacting the public. The exemption under Title V expressly calls the SEC to vital action. It reads, *"the Commission may by rule modify the dollar figures if the Commission determines that such a modification is necessary or appropriate in the public interest or for the protection of investors"*[2] The way the law is written, it is expecting that the SEC will assess the impact of the dollar figures indicated and then will determine if it is necessary or appropriate to make a modification. It is this action that I request of the SEC in this petition.

As a 30+-year veteran of the securities industry and an industry specialist in the market segment being targeted by Title V, I submit this petition because a modification by the SEC is both necessary and appropriate in the public's interest as well as for the protection of investors. I also have first-hand experience of managing the impact of the SEC M&A Brokers No-Action Letter dated January 31, 2014, as amended on February 4, 2014 (the "**NAL**"), after which Title V was

[1] Consolidated Appropriations Act, H.R. 2617, 117th Cong. Div. AA, Title V, § 501 (2022). Available electronically at: https://www.congress.gov/bill/117th-congress/house-bill/2617.
[2] *Id.*

modeled. I am, therefore, uniquely aware of what modifications to Title V and related guidance is necessary.[3]

I will explain the necessity of the SEC's timely rulemaking to provide a modification to the currently stated dollar figures contained within Title V, as well as the specific industry guidance further necessary. Without it, the unintended consequences that will be created by Title V, currently written will include opportunities for substantial money laundering, fraud, and the misrepresentation of investments. The public needs your protection.

Background

On January 31, 2014, the SEC issued the NAL that was the outline for Title V. The intent of both the NAL and Title V is to eliminate securities regulation over Main Street and Mom and Pop[4] type, privately held business transactions, where the regulatory hurdles and the cost of regulation created regulatory obstacles for the business owners as well as the M&A brokers due to earn commission on such transactions.

An example of a transaction that would reasonably fall under the NAL is one where a buyer intends to acquire a Main Street company as the owner/operator and they are, in effect, buying an employment opportunity for themselves. It allows these transactions to be conducted without federal securities regulation that could be overbearing for a relatively small, lower risk, privately held business transfer. In these scenarios, it is common that all parties are known to each other prior to closing, a suitable occupation is the investment goal of the buyer, and the funds to make the acquisition are personally earned funds by the buyer or a commercial bank loan. It also enables the M&A broker to be paid its commission on the transactions without having to also become a registered representative with a broker-dealer which also imposes weighty regulatory requirements. It was with that spirit that the NAL was created.

Subsequently, Title V, as originally drafted pursuant to H.R. 935, was created and modeled after the NAL and ultimately housed within the Consolidated Appropriations Act.[5] The intent of H.R. 935 was the same as the NAL but with economic thresholds added that are grossly misleading and have inadvertently created potential significant and unintended consequences. These consequences were clearly not anticipated by the lawmakers who wrote Title V but can be uniquely prevented by the SEC as stated in Title V itself as "the Commission may by rule modify the dollar figures."

The dollar figures in Title V are defined as those that meet either or both of the following criteria: "(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."

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[3] U.S. Securities and Exchange Commission, No-Action Letter (2014). Electronically available here: https://www.sec.gov/divisions/marketreg/mr-noaction/2014/ma-brokers-013114.pdf.

[4] Kenton, W. (July 8, 2022). *What is Main Street?* Investopedia. Retrieved January 13, 2023, from https://www.investopedia.com/terms/m/mainstreet.asp.

[5] Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2021, H.R.935 — 117th Congress (2021-2022). Electronically available here: https://www.congress.gov/bill/117th-congress/house-bill/935/text.

These dollar figures not only include all Main Street companies as intended, but, inadvertently, they also include the vast majority of the Middle Market. The Middle Market is defined as the market segment including businesses with revenue greater than $10 million but less than $1 billion.[6] This is where an entire industry of investment bankers conducts M&A securities' activity. There are teams of highly trained professional compliance and regulatory personnel that provide guidance specifically to protect the public in every phase of these transactions, typically with professional investors. The goal of the guidance is not just to prevent intentional wrongdoing, but much more often, to avoid inadvertent mistakes made by parties to the transactions. Those mistakes that are prevented on a daily basis by trained professionals would otherwise result in misrepresentation to the public, a lack of suitability assessments for an investment, the over-charging of fees and commission, dealing with unknown and high-risk parties to a transaction, or the conveyance of unvetted funds without assessing for anti-money laundering red flags, to name a few.

Business transfers in the Middle Market are sophisticated, often inclusive of professional investors such as private equity firms or family offices that raise capital and create investment funds to be deployed into a portfolio of companies. Very often this caliber of transaction also attracts funds that are international in nature, where funds are transmitted to the U.S. from foreign countries to which federal securities regulation and applicable compliance measures are applied to vet the target company, the buyers, and sellers and protect the public and their investments.

Title V indicates that a privately held business with an EBITDA of $25 million or less would not require federal securities regulation. A reasonable selling multiple for a business of that size would be a multiple of 10 times EBITDA, or depending on the industry, it may be much larger. Therefore, if a business sells for 10 X EBITDA, where EBITDA is $25 million, that equates to a transaction in the amount of $250 million that would be conducted without federal securities regulation or the safeguarding measures that protect the public.

Conducting securities transactions up to an estimated quarter of a billion dollars per transaction, of the trillions of dollars in business sales per year[7], and then removing the enhanced regulation created to better protect the public, is not only inconsistent with the intent of the NAL and Title V, but also highly contradictory to all the newly created federal regulations that were to protect the public more, not less.

As you know, under federal banking regulations, pursuant to the Bank Secrecy Act of 1970 and, more recently, the USA PATRIOT Act of 2001, deposits at a bank or credit union require reporting of cash deposits in the amount of $10,000 as an anti-money laundering measure. Yet, Title V indicates that it is allowable for increments of $250 million to change hands without the securities laws that were created to protect the public. Opening this opportunity for money laundering is certainly not what lawmakers intended to enact.

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[6] Hayes, A. (May 17, 2022). *Middle Market Firm: Definition, Criteria, and How They Trade*, Investopedia. Retrieved January 13, 2023, from https://www.investopedia.com/terms/m/middle-market.asp.

[7] Mantone, J., & Dholakia, G. (November 23, 2021). Trillion-Dollar M&A Run Continues, S&P Global Market Intelligence. Retrieved January 26, 2022, from https://www.spglobal.com/marketintelligence/en/news-insights/research/trillion-dollar-ma-run-continues.

Discussion
Without the SEC's rulemaking modification to or guidance on Title V, conducting privately held M&A securities transactions in the amount of $250 million each, without federal securities regulation, will mean that the following measures, among others, that were created to protect the public, will be waived:

- Cross referencing the parties to the transaction and the source of the funding against the:
  - Office of Foreign Asset Control (OFAC)
  - Specially Designated Nationals and Blocked Persons list ("SDN List");

- FinCEN's Customer Due Diligence Requirements for Financial Institutions (CDD Rule);

- Anti-money laundering requirements will not be applied, red flags will be ignored, and the source of the funding of any number of transactions will not be in question;

- The JOBS Act requirements of verifying that the issuer is not subject to the "Bad Actor Rule" will not be necessary;

- The "Know Your Customer" (KYC), Customer Identification Program Rule (CIP), and Reg BI will not be enforced and evidence and/or verification of what is represented will no longer be discovered or disclosed;

- Advertising and solicitation regulation preventing promissory language, "guarantees", and the misrepresentations of facts, or opinions represented as facts, will no longer be identified, or prevented;

- Background checks will not need to be conducted or researched to find inaccuracies or omissions on the parties to the transaction; outstanding lawsuits and regulatory restrictions will not be uncovered;

- There will not be suitability determinations made and currently prohibited sales techniques will no longer be disallowed; and

- There will also be no accountability regarding the over-charging of commission on transactions or disclosure or prevention of conflicts of interest.

The currently stated dollar figures in Title V are also counterintuitive to the measures that the SEC and FINRA have taken as recently as June 2022, identifying a greater need and greater ways to protect the public. If Title V is not modified by rule, the following regulations currently serving our industry would be eliminated in staggering dollar amounts in Middle Market transactions:

- SEC Regulation Best Interest (Reg BI), which was created by the SEC to establish a "best interest" standard of conduct, June 30, 2022;

- Capital Acquisition Brokers or CABs were created by FINRA specifically to regulate broker dealers conducting M&A activity, April 14, 2017;

- FinCEN issued the CDD Rule to clarify and strengthen due diligence requirements, May 11, 2016; and

- The JOBS Act, the "Bad Actor Rule", April 5, 2012.

The immediate risk to the business owner, and the investment banker or M&A broker, is if the M&A transaction is met with fraud or misrepresentation, it could bring rescission risk to the transaction causing legal matters for all parties for many years down the road. This would be devastating on many levels.

On a larger scale, however, the gaping money laundering opportunities that Title V creates in increments of $250 million per transaction, would not only cause fraud and corruption to be rampant, but it would inevitably cause the destabilization of the private M&A market which is a driver of the U.S. economy. Certainly, this was not the intent of the lawmakers who enacted Title V.

There is also the impact on the regulatory agencies who are required to regulate business sales and/or securities transactions in the absence of federal securities regulation. In a few states, there is specific business brokerage regulation over business sales, and in more than half of the states in the U.S., the states' real estate regulation governs business sales. But in all cases and states, in the absence of federal securities regulation, state securities regulation also applies.

Not only does the state securities regulation vary greatly from state to state but managing the requirements of each state's regulation for every state involved in every transaction would be a cumbersome task at best. I also do not anticipate that state regulatory agencies could be reasonably prepared for such increased volume and putting the viability of the transactions at risk.

Perhaps an even greater risk of the thresholds contained in Title V is that, without the SEC's rulemaking modifications and further guidance, Title V appears as if it is a waiver of all securities regulations, not just federal. The customers' transactions will be in jeopardy if all applicable real estate, business brokerage, and state level regulation and compliance measures are inadvertently not applied or if they are intentionally circumvented.

Conclusion

The Securities Act of 1933 and the Securities Exchange Act of 1934 were enacted to protect the public and have been doing so since their inception. In our recent history, the SEC and FINRA have recognized the need to escalate the requirements to provide even greater protection and have done so by creating new rules and regulation as recently as June 2022.

All the requirements of the existing SEC rules and regulation should still be upheld by securities law when activity is conducted in the Middle Market where trillions of dollars change hands. The public still deserves this protection.

The NAL and Title V were generated to provide relief to a market segment that includes Main Street privately held businesses from one owner/operator to another. This enables lower-risk transactions to be conducted without the extra cost or burden of securities regulation.

The lawmakers who drafted Title V, very astutely, welcome the SEC to modify the dollar figures if they determine it to be necessary. Because the dollar figures chosen inadvertently include most of the transactions of investment bankers in the Middle Market, and not just those on Main Street, these dollar figures need to be modified accordingly to preserve the intent of Title V, provide clarity to the industry, and continue to protect the public.

I formally request that the SEC act according to the law as stated in Title V and determine that a modification to the dollar figures is both necessary and appropriate. For the foregoing reasons, the SEC should replace the exemption requirements provided by Title V with the following suggested modifications, as consistent with businesses in the middle market:

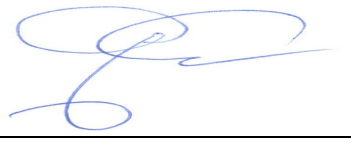
(aa) The earnings of the company before interest, taxes, depreciation, and amortization are less than $1,000,000 (*reduced from $25,000,000*).

(bb) The gross revenues of the company are less than $10,000,000 (*reduced from $250,000,000*).

I also request that the SEC publish further guidance in support of Title V to clarify and continue regulation over transactions also being conducted under the criteria of Title V, but with professional investors on one side of the transaction- to include a private equity group, a family office, a fund, a fund of funds, or the like. Professional investors have an edge over the public, and it is in these situations where the public deserves to have the playing field leveled for all parties to the transaction- not just the professional investors. This guidance will also serve to clarify the intent of Title V and mitigate any interpretive differences.

I would be pleased to answer any questions the SEC may have regarding my petition. I appreciate the SEC's continuing attention to this important matter and for allowing me an opportunity to present my views. Thank you for considering this petition and your forthcoming guidance.

Sincerely,



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