



Licensure Update

- *M&AB Proposals
- *Enforcement Activity
- *BD registration and
New FINRA 79 Exam

Securities Licensure Update

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- *Moderator: Mike Adhikari, President, AM&AA*
- *Panelist: Shane Hansen, Co-Chair, Broker Dealer & Investment Adviser Practice, Warner Norcross Judd*
- *Panelist: Bob Gurrola, Member, AM&AA Licensure Task Force; Chair, Size Cap White Paper Sub-Committee*

What you need to know about ...

- How US & State securities laws can directly affect business brokers and M&A advisors
- FINRA’s new “investment banker” classification (Series 79 exam) and why it only applies to FINRA members
- Status of the M&A Broker Proposal and how it could bring you into compliance with federal and state securities laws
- Why you should support the M&A Broker Proposal

In a nutshell – What is the MAB Proposal?

- M&A Broker Exemption Rule – key features
 - Covers brokering business sale transactions
 - Federal exemption from SEC registration
 - Exemption from FINRA membership
 - Annual home state registration (firm level only)
 - Notice filing in other states having jurisdiction
 - Written disclosures (firm, services, staff, and conflicts)
 - Written engagement for services
 - Specified illegal and unethical business practices

In a nutshell – What's the Small Business Sale Exemption?

- Small Business Sale Exemption Rule
 - Codifies Country Business, Inc. no-action letter
 - Legal authority of an SEC rule under federal law
 - Model rule proposed for state regulators to adopt

Recent developments

- SEC Government-Business Forum and Reports
 - <http://www.sec.gov/info/smallbus/sbforum.shtml>
- NASAA Conference – Monitoring the Middlemen: Enhancing the Regulation of Third Party Finders
 - http://www.nasaa.org/about_nasaa/conferences/8918.cfm
- FINRA “investment banker” classification (Series 79)
- FINRA – Proposed rule regulating payments by members to unregistered persons
 - <http://www.finra.org/Industry/Regulation/Notices/2009/P120481>

Recent developments

- Commission's priorities – national crisis
- SEC staff supportive – few concerns
 - Potential “size cap” for the exemption
 - Sale of public company excluded from current proposal
- Potential state level examination qualification
- Proposed “Form M&AB” (adapted from existing Form BD) using WebCRD System

The “inconvenient truth” ...

...about US & state securities laws

...and how they directly impact
business brokers & M&A advisors

The “inconvenient truth” ...

- When they facilitate any business sale that involves securities...
- ...most US business brokers and M&A advisors operate in violation of US and state securities laws more often than they generally realize

The “inconvenient truth” ...

- The sale of a business is always a securities transaction if it involves ...
 - The purchase or sale of “stock” (vs an “asset” sale)
 - The exchange or issuance of stock (e.g., a merger)
 - The issuance or exchange of stock, options, warrants, or other securities
 - The sale of stock to an ESOP
 - A fractional interest in the business

The “inconvenient truth” ...

- The sale of a business may likely be a securities transaction if...
 - It involves an **earn-out**
 - It involves a “**Seller’s Note**”

The “inconvenient truth” ...

- Securities laws regulate . . .
 - The offer, sale, exchange or issuance of securities
 - Require securities registration or a registration exemption
 - Require antifraud disclosures of all material information
 - Prospectus or offering document (private placement memo)
 - Impose liability for material misstatements or omissions

The “inconvenient truth” ...

- Securities laws also regulate . . .
 - The intermediary who is “effecting” the transaction
 - Requires broker-dealer registration and regulation
 - Securities and Exchange Commission
 - Each state in which the BD conducts business by communicating with clients and prospects
 - Requires FINRA (f/k/a NASD) membership
 - Extensive, expensive, and complex compliance requirements

A “broker” is defined as...

- ...“any person engaged in the business of effecting transactions in securities for the account of others”
- Nature of the services trigger the definition:
 - Introducing the parties plus any involvement in . . .
 - Advising the buyer or seller
 - Negotiating terms and conditions
 - Assisting with closing the transaction

A “broker” is defined as...

- Transaction-based compensation is a key factor -
 - A contingent success fee is “transaction-based compensation”
 - It may alone be sufficient to trigger “broker” status
 - A *bona fide* fixed hourly consulting fee, not contingent on the outcome, will be viewed in light of the activities
 - **e.g., fees for financial accounting or legal services**

Who must register as a broker-dealer?

- SEC's Broker-Dealer Guide says . . .
 - “Finders,” “business brokers,” and other individuals or entities that engage in the following activities:
 - Finding investors, making referrals, or splitting commissions with registered broker-dealers
 - Finding investors for “issuers” (entities issuing securities), even in a “consultant” capacity

Who must register as a broker-dealer?

- Finding buyers and sellers of businesses (i.e., activities relating to mergers and acquisitions where securities are involved)
- (<http://www.sec.gov/divisions/marketreg/bdguide.htm>)

SEC recently affirmed it's position...

- **SEC Letter to Hallmark Capital Corp, 2007 SEC No-Action LEXIS 509 (6/11/07), where the firm said it ...**
 - Assists small businesses with mergers and acquisitions;
 - For Sell-side Clients:
 - Prepares a confidential information summary;
 - Identifies companies that might be interested in buying;
 - Qualifies prospective buyers and arranges meetings;

SEC recently affirmed it's position...

- For Buy-side Clients:
 - Identifies acquisition targets;
 - Conducts preliminary information gathering interviews;
 - Prepares an acquisition profile on the target company
- Compensated based on the transaction value.
- **SEC said Hallmark should be registered as a BD**

Consistent with earlier SEC positions...

- **SEC Letter to Mike Bantuveris, 1975 SEC No-Action LEXIS 2158 (9/23/75), where the firm said it would:**
 - Identify and evaluate possible acquisition candidates
 - Assist its clients in formulating offers, negotiating agreements and assembling documents
 - Receive compensation proportional to the transaction value
- **SEC declined to take a no-action position**

Common misconceptions...

- **“Sale of business doctrine”**
 - Before 1985, some courts held the sale of all of the corporate stock in a business was not a “security” under federal laws
 - Under federal securities laws, this view was rejected in 1985

Common misconceptions...

- In *Landreth Timber* the U.S. Supreme Court held:
 - If the instrument is called “stock,” and
 - If it has the characteristics associated with stock,
 - Then it is a “security” under federal securities laws
- Under federal securities laws corporate stock in a for-profit enterprise is usually a “security”

Common misconceptions...

- **“Exempt securities” and “exempt transactions”**
 - The exemption is from the issuer’s registration of securities
 - These are still “securities” and “securities” transactions
 - These are not exemptions from broker-dealer registration
- **No broker-dealer registration exemption based on deal size**
- **Current BD registration exemptions do not fit M&A activities**

The “inconvenient truth” ...

- In any business sale which involves the purchase, sale, issuance, or exchange of stock or other types of securities...
- US & state securities laws apply in addition to state laws, like real estate licensing laws
- **Ignoring these laws can hurt both you and your clients**

When violated, US & state securities laws...

- Render all related contracts void and unenforceable
 - A disgruntled M&A client can “just say no” to your fee
- Create civil remedies for injured persons (could be the buyer or seller)
 - Actions against the securities issuer (seller)
 - Actions against the M&A broker/advisor
 - Remedies could include rescission of the deal

When violated, US & state securities laws...

- **Can result in administrative enforcement actions**
 - Fines, penalties, and disgorgement of compensation
 - Limitations or bars from future BD registration
 - Permanent, public regulatory disclosures
- **Can carry criminal liabilities where there is fraud**

Recent adverse cases . . .

- *Torsiello Capital Partners LLC v. Sunshine State Holding Corp.*
 - 2008 N.Y. Misc. LEXIS 2879 (4-1-08)
 - Unregistered M&A broker lost all of his compensation
- *Murphy v. Stargate Def. Sys. Corp.*
 - 2007 U.S. App. LEXIS 18982 (6th Cir. Ohio, 2007)
 - Unregistered M&A broker

Recent adverse regulatory actions . . .

- *SEC v. Michael W. Crow, Duncan Capital LLC, et al*
 - 07-Civ-3814 (CM)(S.D.N.Y.)(4-23-08)
 - Enforcement against unregistered broker raising capital
<http://www.sec.gov/litigation/litreleases/2008/lr20535.htm>
- *SEC - Ram Capital Resources, LLC (2009)*
 - Enforcement against unregistered broker raising capital
 - Revenues forfeited plus fines and 12-month bar from activities
www.sec.gov/news/digest/2009/dig062209.htm
www.sec.gov/litigation/admin/2009/34-60149.pdf

Recent regulatory developments . . .

- Utah letter to M&A and business brokers
www.securities.utah.gov/business%20broker.pdf
- New Form D – registration # for “finders”
<http://www.sec.gov/answers/regd.htm>

Four basic compliance strategies...

- Handle only pure “asset sale” transactions – no jurisdiction under securities laws if there are no securities involved
- Structure sell-side engagements per the Country Business letter

Four basic compliance strategies...

- Individually register with an existing broker-dealer firm to handle the deal – subject to FINRA regulation
- Register your firm as a broker-dealer (or form a new affiliated firm) – subject to FINRA regulation

Handle only “asset sale” transactions . . .

- Asset sales are generally not subject to securities laws
- Cash consideration only . . .
 - No stock sold, exchanged, or issued by either party
 - Promissory notes could be securities, if they are . . .
 - More than just short-term (9 months)
 - Negotiable to other holders
 - Held by passive investors

Handle only “asset sale” transactions . . .

- No retained equity interest or stock rights held by the seller
- No equity interest in the buyer/successor issued to the seller
- No involvement in the buyer’s raising cash from investors

Limit activities to the *Country Business, Inc.* (CBI) no-action letter...

- This was a significant IBBA accomplishment
 - There had been doubt about validity of the *International Business Exchange Corporation* no-action letter (1986)

Limit activities to the *CBI* letter...

- A no-action letter is an “ad hoc” statement of the SEC staff’s view whether or not it would bring an enforcement action
 - The same factual conditions must be met to have the assurance about the SEC staff’s conclusion
 - SEC no-action letters are not legally binding on courts, state securities regulators, or private parties in civil litigation
 - Carefully compare your circumstances with the *CBI* letter
<http://www.sec.gov/divisions/marketreg/mr-noaction/cbi110806.htm>

Limit activities to the *CBI* letter...

- SEC staff said it would not bring an enforcement action when an “asset deal” turns into a “stock deal” where ...
 - M&A broker is engaged to sell the whole business
 - Does not cover “buy-side” or “transaction” engagements
 - Does not cover sale of less than 100% ownership
 - The business must be a “small business” according to Small Business Administration standards (varies by industry)

<http://www.sba.gov/services/contractingopportunities/sizestandardsttopics/index.html>

Limit activities to the *CBI* letter...

- Broker may advertise the business for sale, but not securities
- Broker's compensation paid in cash (installments or contingent)
- Broker cannot advise about valuing or issuing securities
- Broker cannot advise about a stock sale transaction structure

Limit activities to the *CBI* letter...

- Once it becomes a stock sale, the broker's role is limited:
 - Transmitting documents between the parties
 - Valuing the assets of the business as a going concern
 - Providing the seller with administrative support
 - Assisting the seller in preparing financial statements
- Except for commercial loans, the broker cannot assist in raising capital or obtaining third-party financing
 - Only UN-compensated referrals to commercial lenders

Limit activities to the *CBI* letter...

- Design your engagement agreement to . . .
 - Describe the transaction as the sale of the entire business
 - Define the scope of your services to permitted activities
 - Describe the limitations on services if the deal structure becomes stock sale (e.g., attorneys to handle negotiations)
 - Be cautious in describing your qualifications – potential antifraud liability for misrepresentations

Limit activities to the *CBI* letter...

- “Paper the file” to defend yourself
 - Establish written policies and procedures
 - Train employees on the P&P – document training occurred
 - Keep transaction files and related correspondence

Individually register with an existing BD...

- A number of registered broker-dealers specialize in M&A
 - The firm must be properly qualified (discussed later)
 - The individual must be properly qualified

Individually register with an existing BD...

- The BD firm must handle the M&A engagement
 - Design your engagement agreement to assign your rights
 - The BD firm must supervise the transaction
 - The M&A client must become a client of the BD firm
 - The BD firm must review/retain all transaction documents
 - The “success fee” must flow through the BD firm
 - The BD firm will then pay the individual his/her share

Individually register with an existing BD...

- Must pass the appropriate FINRA examination:
 - FINRA Series 7 – General Securities Representative, OR
 - Activities limited to M&A –
 - FINRA Series 79 – Limited Investment Banker Rep;
 - Activities limited to capital-raising -
 - FINRA Series 62 – Limited Corporate Securities Rep, OR
 - FINRA Series 82 – Limited Private Placement Rep
- AND Series 63 uniform state securities law exam

Individually register with an existing BD...

- BD registers the individual with FINRA and states
 - Registration on Form U-4 (signed by rep and filed by the firm)
<http://www.finra.org/Industry/Compliance/Registration/CRD/FilingGuidance/p005235>
 - Registration through FINRA's WebCRD System
 - Finger printing
 - Submission for FBI background check
 - Statutory disqualifications for felonies, etc.

Individually register with an existing BD...

- Individual regulated as an “associated person” of BD
- Individual is subject to SEC, FINRA and state jurisdiction and regulation
- Summary of a rep’s regulatory responsibilities at:

<http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/RegisteredReps/Brochure/>

Individually register with an existing BD...

- All securities transactions must be handled through the BD
 - All transactions must be supervised by a **registered principal**
- Individual must report “outside business activities” to the BD
- Individual must follow the BD firm’s policies and procedures
- Individual’s office and securities records are subject to . . .
 - BD’s periodic audits (typically at least once every 3 years)
 - Examination by SEC, states, and FINRA examiners

Individually register with an existing BD...

- Principal registration is required for individuals who:
 - Are involved in the BD's management and operations
 - Recruit and supervise a rep's securities activities
 - Supervise and approve securities transactions (M&A deals)
- Principal's activities and responsibilities are summarized:

<http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/RegisteredReps/Qualifications/P011098>

Individually register with an existing BD...

- Typically, individual will be an independent contractor
 - Representative agreement will cover such things as . . .
 - Permitted and prohibited securities-related activities
 - Supervision of all securities-related activities by the BD
 - Compensation to be paid in securities transactions
 - Representative's responsibility for:
 - Indemnification of the BD firm

Individually register with an existing BD...

Restrictions on securities compensation sharing . . .

- Individual cannot assign securities compensation to:
 - Unregistered M&A firm; or
 - Unregistered individuals
- Scenarios rejected by the SEC no-action letter to 1st Global, Inc., 2001 SEC No-Act. LEXIS 557 (5-7-01)
- Individual may pay for *bona fide* business expenses
 - (e.g., office space and equipment and utilities, clerical)

Register your firm as a broker-dealer . . .

- BD registration with the SEC also requires membership in FINRA (f/k/a NASD)
 - FINRA is a “self-regulatory organization” (SRO)
 - Extensive preparation required before filing the application
 - Detailed “business plan” meeting FINRA’s specifications
 - 12 month pro forma financial projections with footnotes
 - Comprehensive compliance policies and procedures

Register your firm as a broker-dealer . . .

- Membership application process

<http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/index.htm>

- Approximately six months from date of filing
- Nonrefundable application and registration fees
- Individual testing of all principals and representatives
- Initial cost may range from \$35,000 to \$50,000, and higher with greater complexity in structure or activities
- Annual FINRA membership assessments, registration fees, and on-going compliance costs may exceed \$15,000

Register your firm as a broker-dealer . . .

- FINRA and securities regulation is complex and extensive
 - Competent compliance staffing is essential
 - Regulatory requirements are oriented for “retail brokerage” so need “translation” into M&A context

Register your firm as a broker-dealer . . .

- See the *Comparison of Existing and Proposed Securities Regulation* (see the handouts)

Description	Fully-registered Broker-Dealer	Proposed M&A Broker	Business Broker (<i>Country Business Letter</i>)
Permitted securities-related activities	<ul style="list-style-type: none"> ■ All activities permitted subject to related requirements and prohibitions listed below; ■ Activities are generally restricted by the ED's business plan as submitted to FINRA in the new membership process and the FINRA membership agreement signed when membership is approved, unless and until those documents are amended by later application. 	<p>Limited to the following and subject to prohibitions listed below:</p> <ul style="list-style-type: none"> ■ Participation in the purchase or sale of a business, a line of business, or a controlling interest if the buyer is actively involved in its management or operation; and ■ Assist the seller or buyer with financial modeling and analysis of the business; and ■ All asset sale BB activities. 	<ul style="list-style-type: none"> ■ If the transaction turns into a stock sale, the activities must be limited to: <ul style="list-style-type: none"> ▪ Transmitting documents between the parties; ▪ Valuing the assets of the business as a going concern; ▪ Providing the seller with administrative support; and ▪ Assisting seller in preparing financial statements; ■ Assisting with commercial loan applications

Register your firm as a broker-dealer . . .

- Consider registering a separate affiliated entity as the BD
 - Helps to avoid questions about historical activities
- Quarterly and annual GAAP financial statements required
- Annual independent audit report filed with the SEC/FINRA

Register your firm as a broker-dealer . . .

- Minimum net capital requirement (continuous compliance)
 - Minimum of \$5,000 in cash/cash equivalents, plus required “cushion” of 20% (\$1,000)
 - Limitation on aggregate indebtedness
- Regulation of public communications and advertising
- FINRA approval for change of ownership or a material change of business size, scope, or activities
- Examinations by FINRA and SEC; sometimes states

What should I do NOW?

- Analyze the kinds of deals you do
- Confer with your own attorneys
- Assess the risks to you and your clients
- Pick which compliance strategy is right for you
- **Support the M&A Broker Proposal**

How does the MAB Proposal help?

- Securities laws still apply, but . . .
- If adopted by the SEC, M&A brokers . . .
 - would not register as a B-D with the SEC;
 - would not become members of FINRA

How does the MAB Proposal help?

- Initial and on-going compliance requirements and costs would be substantially less
- Broker's contracts would not be void by law

Highlights of the MAB Proposal

- As proposed, an M&A Broker could...
 - Broker and advise in M&A transactions:
 - Transferring all or part of the business where the buyer is to be actively involved in the business
 - Regardless of the legal structure (stock or assets)
 - No deal size limitation proposed, but
 - Could not buy/sell a publicly traded company

Highlights of the MAB Proposal

- **Represent buyers and sellers (or independent);**
 - Could represent a publicly traded buyer;
 - Could not advise about issuing publicly traded stock
- Advise about deal structures – stock, assets, ESOP, etc.

An M&A Broker could also ...

- Advise about the value of the business (but not the market value of its stock or IPOs)
- Negotiate the price and terms of the purchase/sale
- Advertise the business itself for sale (but not stock)
- Receive cash and/or restricted stock compensation

An M&A Broker could also ...

- If permitted by FINRA rules (currently prohibited), receive referral fees from fully registered broker-dealers or PPBs
- Receive fully-disclosed referral fees from commercial lenders
- Market itself as a “Registered M&A Broker/Advisor in [States]”

An M&A Broker could not...

- **Participate in any aspect of capital-raising**
 - Some recapitalization transactions – i.e., raising new capital without selling the business – may not qualify
 - If adopted by the SEC and states, a “private placement broker” (PPB) proposal would permit limited capital raising
- **Organize groups of investors such as forming an equity fund**
- **Advise about or participate in public offerings**

An M&A Broker could not...

- Deal with a “public shell company”
(i.e., publicly traded company without significant business operations)
- Handle or have custody of the funds or securities
- Close the deal without client’s written authority

Compliance Requirements under MAB

- **A simplified system of state-level regulation:**
 - **Annual firm registration covering its reps**
 - Registration in “home state” and notice filing in others
 - **Delivery of a disclosure document to prospective clients**

Compliance Requirements under MAB

- **Require written engagement and specific business records**
 - A compliance manual addressing securities laws
 - A “complaint file” for regulatory inspection
- **Define and prohibit abusive practices in the M&A context**
- **Regulators retain authority to inspect securities activities**

Related proposal would strengthen the CBI no-action letter...

- Small Business Sales Exemption Rule would:
 - Codify the Country Business, Inc. No-Action letter into a Commission-adopted rule
 - Have the legal weight and authority of an SEC rule, not just a staff interpretation
 - Be easier to understand and apply in practice
- A similar model rule is proposed to apply CBI No Action letter at the state level

What is the PPB Proposal?

- ABA PPB Task Force published the proposal in 2005
 - Now believed to be patterned after our MAB Proposal
- Would allow limited capital-raising activities from accredited investors without SEC B-D registration or FINRA membership
- Generally under concurrent consideration by the SEC staff

If the MAB Proposal is not adopted, what are the consequences?

- M&A brokers handling securities deals must be:
 - Registered as a BD with the SEC
 - Registered as a BD with one or more states
 - A FINRA member
- Individuals must be registered principals or representatives through a BD with FINRA and one or more states

Turning to FINRA's new Series 79 exam, who or what is FINRA?

- FINRA is a “self-regulatory organization” (“SRO”) of registered broker-dealers
- FINRA membership is required by federal law if a firm is registered with the SEC as a B-D
- FINRA was formerly called the NASD (National Association of Securities Dealers)
- FINRA's authority is limited to its member firms and their individual representatives

Do FINRA's rules apply to me now?

- **FINRA rules only apply to its members**
- **FINRA does not decide who must register**
- **Neither the SEC nor FINRA enforce FINRA rules against non-members**

What's the buzz about the Series 79?

- FINRA's new classification for M&A activities:
 - Limited Representative – Investment Banker
 - Series 79 Investment Banking Exam to qualify
 - Effective November 2, 2009
- This is only one of many FINRA categories and related qualifications for individuals

Why the buzz about the Series 79?

- The new “investment banker” classification brings more focus on when must an M&A broker be securities licensed
- Many brokers mistakenly reacted to the Series 79 exam – only the exam is new
- M&A activities have been subject to securities laws and regulation all along

Does the Series 79 derail the MAB Proposal?

- **NO!**
- Changes in FINRA's categories and qualifications for representatives have **NO BEARING** on whether a firm must be registered as a B-D.
- This is a FINRA rule, **NOT** an SEC rule.

Was the Series 79 created because of the MAB proposal?

- **NO!**
- Series 79 requested by multi-national investment banking firms so U.S., U.K. and Canadian reps need not take the Series 7
- Canadian and U.K. representatives can be grandfathered into the new classification

Did the Series 79 come as a surprise?

- **NO!**
- SEC published FINRA's rule for public comment
- AM&AA, ICBC, M&A Source, and MBBI submitted comment letters
 - We agreed it was a good idea – the exam content is more relevant; and
 - An opportunity to promote the MAB Proposals

SEC's approval order acknowledges...

- In approving FINRA's rule, the SEC stated:
“Four of the six commenters raised the issue of a proposal previously made to the Division of Trading & Markets (the “Division”) that would create a federal registration exemption and simplified system of regulation for merger and acquisition intermediaries. See AM&AA Letter; ICBC Letter; M&A Source Letter; MBBI Letter. The proposal is not germane to this proposed rule change and is being considered separately by the Division.”
[Emphasis added]

What's the bottom line on Series 79?

- **FINRA's new rule does not change federal and state securities laws**
- **The scope and jurisdiction of the SEC, states, and FINRA are unchanged**
- **This is only a reclassification of representatives by FINRA and a new qualification exam**

So what activities are covered by FINRA's investment banker category?

- The “investment banker” classification covers:
 - advising on or facilitating debt or equity securities offerings through a private placement or a public offering, including but not limited to origination, underwriting, marketing, structuring, syndication, and pricing of such securities and managing the allocation and stabilization activities of such offerings, or

Covered activities also include . . .

- More relevant, it also covers:
 - advising on or facilitating mergers and acquisitions, tender offers, financial restructurings, **asset sales**, divestitures or other corporate reorganizations or business combination transactions, including but not limited to rendering a fairness, solvency or similar opinion

Are “asset sales” regulated under Series 79?

- Upon learning that "asset sales" are included in the list of regulated activities under the new rule, many business brokers and M&A advisors have mistakenly concluded that the SEC and FINRA are "breaking new ground" that was previously the sole province of the states, and/or state real estate law.

Why are “asset sales” included?

- Examining FINRA’s Series 79 exam study guide suggests that the reference to “asset sales” pertains to transactions where the Buyer issues stock or other securities in exchange of the Seller’s assets, not purely asset sales that do not involve any securities.
- Asset sales for cash consideration are generally exempt from securities laws and FINRA jurisdiction if conducted outside of the registered B-D firm.

The Bottom Line re: “asset sales” ...

- FINRA jurisdiction extends to all activities that are conducted inside a member B-D
- All securities transactions – e.g., stock sales – must be conducted through the B-D
- Activities not related to securities – e.g., purely asset sales – may be conducted outside the firm

The bottom line re: Series 79...

- FINRA's new Series 79 exam is not breaking new regulatory ground
- FINRA's rule does not change who should be registered as a B-D
- If you, or your firm, handle securities transactions described in FINRA's new rule, you should have been registered all along

Where do the proposals stand at the SEC?

- All indications are that our proposal is very much alive and well, and being well received
- The meltdown of the U.S. economy, the failures of major securities firms like Lehman and Bear Stearns, and the Madoff scandal (among others) have consumed the SEC's attention for the last year
- Work on the proposal has continued at the staff level
- Pursuing the Commissioners' attention for follow-up meetings

And where do we stand with the states?

- **NASAA's incoming President, Denise Crawford, and others among NASAA's leadership are strong supporters**
 - The proposal was discussed at the annual SEC-NASAA meeting in Washington DC in May 2009
 - NASAA's September Annual Meeting featured a panel discussion – Monitoring the Middlemen: Enhancing the Regulation of Third Party Finders
 - The panel, organized and hosted by Tanya Solov (Illinois), included Hugh Makens, co-counsel on the MAB proposal, and SEC staff attorney, Joanne Rutkowski
 - The proposal is on agenda for discussion in meetings between the NASAA President and the SEC Chair

What can we do to support the Campaign for Clarity?

- Once the M&AB proposal is released for public comment – first by the SEC, and later by NASAA – we will ask for support letters and emails
- Once NASAA recommends the M&AB proposal as a model rule to its member states, we will ask for support letters/e-mails to your home state regulators
- We will advise you in plenty of time when these windows of opportunity open and provide key discussion points

What more can I do? . . .

- **Right now we also need your financial support!**
- **To date this effort has been totally funded by voluntary contributions from individuals, firms and professional associations who recognize the need to clarify and – if possible – simplify the securities laws that can directly affect business brokers and M&A advisors**

What more can I do? . . .

- Expenses incurred thru 11/30/09: \$325,000
- Estimated future expenses: \$120,000
- Payments to date: \$225,000
- Add'l Contributions & Pledges: \$ 40,000
- Add'l Fundraising objective: \$200,000

Partial list of contributors

- Alliance of Merger & Acquisition Advisors (AM&AA)
- International Network of M&A Partners (IMAP)
- Alliance for Corporate Wealth (ACW)
- Midwest Business Brokers & Intermediaries (MBBI)
- International Business Brokers Association (IBBA)
- M&A Source
- Business Brokers of Florida (BBF)
- Colorado Association of Business Intermediaries (CABI)
- Mid Atlantic Business Intermediaries Association (MABIA)
- Texas Association of Business Brokers (TABB)
- California Association of Business Brokers (CABB)
- Institute of Certified Business Counselors (ICBC)
- Georgia Association of Business Brokers (GABB)

What more can I do? . . .

- In addition to the funds which have already been raised, we estimate that we need to raise an additional \$150,000 to complete this project
- Encourage other professional associations you belong to, to contribute and set up their own \$ for \$ matching program
- Contribute your fair share

AM&AA Marketplace Leadership Fund

Yes, I want to give my fair share to support AMAA's Campaign for Clarity.
Suggested Gift Levels (Please check one)

- Professional Association Sponsor -- \$10,000+
- National M&A Firm Sponsor -- \$5,000 - \$9,999
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Please accept my pledge for \$ _____ to be paid on or before December 31, 2010.

Please accept my pledge for \$ _____ to be paid from my proceeds of my next closing.

Signature

Date



Questions?

What is the definition of a "security?"

- "...any note, stock, treasury stock, security future, bond, debenture, certificate of interest or participation in any profit-sharing agreement ... preorganization certificate or subscription, transferable share, investment contract... any put, call, straddle, option... or in general, any instrument commonly known as a "security"..."

What is the definition of a "security?"

- SEC and most states treat LLC membership interests as securities
 - Expressly included in the “securities” definition in some states
 - Other states apply “investment contract,” “profit-sharing agreement,” “risk capital analysis,” or “characteristics of stock” tests

When is a “seller’s note” a security?

- A “note” is in the statutory definition of a “security”
- A “note” is presumed to be a “security” unless it bears strong “family resemblance” to instruments held not to be securities
 - Reves vs. Ernst & Young, U.S. Supreme Court (1990)
- Case law is highly fact-specific and is not consistent
 - See *Promissory Notes as Securities*, 39 ALR Fed 357 (2004)
 - e.g., In the Matter of Gebhart, 2006 SEC LEXIS 93 (1/18/06)
 - See SEC Release No. 33-4412 (1961)

When is a “seller’s note” a security?

- **State securities regulators also presume that a “note” is a security**
 - http://www.nasaa.org/Investor_Education/Investor_Alerts_Tips/1693.cfm

“Red flags” when a seller’s note is more likely to be a security...

- When one or more of the following factors exist:
 - The note’s term is for more than 90 days
 - The notes are freely transferable (i.e., assignable or “negotiable”)
 - The note holder was not or is not active in the business for the term of the note
 - The note represents an investment to the holder

“Red flags” when a seller’s note is more likely to be a security...

- The note is not secured by collateral (or perhaps under-secured)
- There are multiple note holders (implying a “plan of distribution”)
- There are “equity kickers,” “shared appreciation features,” adjustable rates, or terms that affect the risks to the note holder
- Convertibility and other features (e.g., puts, calls, options)

More information . . .

- SEC registration and regulation
 - Guide to Broker-Dealer Registration
<http://www.sec.gov/divisions/marketreg/bdguide.htm>
- FINRA membership and regulation
 - FINRA “How to Become a Member” Guide
<http://www.finra.org/RegistrationQualifications/MemberFirms/index.html>

More information . . .

- State registration/licensing

http://www.nasaa.org/industry_regulatory_resources/broker_dealers/520.cfm

- Alliance of Merger & Acquisition Advisors

- Recent developments and more . . .

<http://www.amaaonline.com/advocacy>

More information . . .

- Registration and regulation of broker-dealers
 - See matrix comparing the M&AB Proposals
 - SEC Guide to Broker-Dealer Registration
 - <http://www.sec.gov/divisions/marketreg/bdguide.htm>
 - How to Become a FINRA Member
 - <http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/MemberFirms/index.htm>
 - State securities registration and regulation
 - http://www.nasaa.org/Industry_Regulatory_Resources/Broker_Dealers/

More information . . .

- FINRA Rule 1032(i) - investment banking
 - SEC order approving the classification
 - sec.gov/rules/sro/finra/2009/34-59757.pdf
 - sec.gov/rules/sro/finra/2009/34-59484.pdf
 - FINRA Regulatory Notice 09-41
 - <http://www.finra.org/Industry/Regulation/Notices/2009/P119462>



Shane Hansen practices law in the area of financial services regulation, including banks, broker-dealers, investment advisers, financial planners and money managers. He advises clients about business, corporate, banking, securities and franchise laws and regulations. He has substantial experience involving mergers, acquisitions and sales of financial institutions and their assets. He co-chairs the Broker-Dealer and Investment Adviser Practice Group at Warner, Norcross & Judd LLP. More information is available at www.wnj.com

Securities and M&A Experience

- Co-chair, State Liaison Subcommittee, Committee on State Securities Regulation, ABA Business Law Section
- Formation, registration, and regulation of broker-dealers and investment advisers under federal and state securities laws and FINRA rules
- Broker-dealer and investment adviser compliance issues
- Responding to regulatory inspections, exceptions, and enforcement matters
- 20 years of M&A experience involving banks and bank holding companies and their assets

Honors

- *Best Lawyers in America*, Corporate Law and Securities Law, 2007-2010
- *Michigan Super Lawyers*, 2006, 2007, and 2009

Education

- University of Michigan J.D. 1982 (cum laude)
- Albion College B.A. 1979 (magna cum laude)