

AM&AA Licensure Initiative

2008 Summer Conference Update
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AM&AA Licensure Task Force

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What is the AM&AA Licensure Initiative?

- ◆ Find workable solutions to make federal and state securities regulation appropriately fit the activities of M&A intermediaries and business brokers
- ◆ Three avenues to fit the full spectrum of activities
 1. Support rulemaking to adopt the ABA PPB Task Force proposal to regulate raising-capital intermediaries as a "**Private Placement Broker**"
 2. Develop rulemaking to create a system of "**M&A Broker**" regulation for M&A intermediaries and business brokers
 3. Develop rulemaking to elevate the CBI No Action letter to a "**CBI Exemption**" for M&A intermediaries and business brokers

Today's agenda

- ◆ How federal and state securities laws and regulations affect M&A intermediaries and business brokers
- ◆ Overview of the M&A Broker (MAB) and Private Placement Broker (PPB) rulemaking proposals to SEC and the states
- ◆ How you can help to solve this problem
- ◆ Q&A from the audience

Licensure Task Force Steering Committee

- ◆ **Mike Nall**, Founder AM&AA, Founder Alliance for Corporate Wealth (ACW), Chicago, IL; Member, ACG
- ◆ **Jim Cornell**, CEO Praxis Business Advisors, West Seneca, NY, Member AM&AA Board of Advisors; Founding Chair, AM&AA Licensure Task Force, Member, ACG
- ◆ **Mike Ertel**, The Bradway Group, Tampa, FL; Member AM&AA Board of Advisors; Co-Chair AM&AA Licensure Task Force, Member, IBBA, M&A Source, ACG, Business Brokers of Florida (BBF)
- ◆ **Mike Adhikari**, President & Founder, Illinois Corporate Investment & Business Value Express, Lincolnshire, IL, Incoming President, AM&AA, Past President, Midwest Business Brokers & Intermediaries (MBBI); Member, ACG, IBBA, M&A Source.
- ◆ **John Zayac**, President, IBG Business Services, Denver, CO; Member AM&AA, IBBA, M&A Source, IBBA Strategic Issues Task Force (SITF), Colorado Association of Business Intermediaries (CABI)
- ◆ **John Johnson**, Bluestem Resources Affiliated Group, Tulsa, OK; Member, IBBA, M&A Source, IBBA Strategic Issues Task Force

Licensure Task Force Steering Committee

- ◆ **Raymond Horn**, Attorney, Meltzer, Purtill & Stelle LLC, Schaumburg, IL; Board Member, MBBI, Member, MBBI's Licensure Committee
- ◆ **Brian Wendler**, Director, National Business Valuation Services, Dallas, TX; President, Institute of Certified Business Counselors
- ◆ **Brian Knight**, President, Country Business, Inc., Manchester Center, VT; Past Chair, IBBA, Founding Member, IBBA Strategic Issues Task Force
- ◆ **Gary Johnson**, President, Calhoun Companies, Minneapolis, MN; Past Chair, IBBA; Co-Chair, IBBA Strategic Issues Task Force
- ◆ **Hugh Makens**, Warner Norcross & Judd, Warner, Norcross & Judd, Co-chair Securities Practice Area, Founding Chair & Member, ABA Task Force on Finders
- ◆ **Shane Hansen**, Warner Norcross & Judd, Grand Rapids, MI; Co-chair ABA Business Law Section, Committee on State Securities Regulation's State Liaisons

Association Financial Supporters (to date)

- ◆ 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)
- ◆ Numerous Individuals and Firms
(see AM&AA website www.amaaonline.com for complete list)

Why should this concern me?

- ◆ Securities Exchange Act of 1934 governs securities markets and how “brokers” and “dealers” operate
- ◆ A “**broker**” is “any person engaged in the business of effecting transactions in securities for the account of others”
 - Receipt of transaction-based compensation (i.e., a commission) is a key factor in determining whether broker-dealer registration is required
- ◆ SEC publishes a Broker-Dealer Guide on its website describing who is required to register as a BD (<http://www.sec.gov/divisions/marketreg/bdguide.htm>)

◆ SEC's BD Guide says each of the following individuals and businesses may need to register:

- "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 . . . or other securities intermediaries;
 - ◆ **Finding investors for "issuers"** (entities issuing securities), even in a "consultant" capacity;
 - ◆ Engaging in, or finding investors for, venture capital or "angel" financings, **including private placements**; or
 - ◆ **Finding buyers and sellers of businesses** (i.e., activities relating to mergers and acquisitions where securities are involved)

◆ Where a “**security**” is involved, securities laws . . .

- Regulate **the intermediary** regardless of deal structure or size
- Regulate **the manner of offering** (selling/exchanging) securities
- Require **antifraud disclosures** of all material information
- Create **administrative, civil, and criminal remedies** for violations
- Generally, **apply IN ADDITION to other state laws** licensing real estate brokers, business brokers, mortgage brokers, etc. (few states have harmonized the requirements)

How does this affect me?

- ◆ “Investment banking” or “corporate finance” services require federal and state broker-dealer registration and regulation
 - Membership in FINRA (f/k/a NASD) is also required
 - Holding yourself out as providing these services is a factor used by courts in determining that you are, in fact, acting as a broker-dealer

- ◆ Brokering the purchase or sale of a business . . .
 - SEC Letter to Hallmark Capital Corp, 2007 SEC No-Act. LEXIS 509 (6/11/07)
 - SEC Letter to Mike Bantuveris, 1975 SEC No-Act. LEXIS 2158 (9/23/75)

◆ Raising capital for a business . . .

- *Torsiello Capital Partners LLC v. Sunshine State Holding Corp.*,
2008 N.Y. Misc. LEXIS 2879 (4-1-08)
- The intermediary engaged to raise capital lost his fee and his retainer
- *SEC v. Michael W. Crow, Duncan Capital LLC, Duncan Capital Group LLC, Robert David Fuchs, and Robert MacGregor*, 07-Civ-3814
(CM)(S.D.N.Y.)(4-23-08)
<http://www.sec.gov/litigation/litreleases/2008/lr20535.htm>
- SEC brought enforcement action against the intermediary for acting as an unregistered broker-dealer; all compensation disgorged in settlement

Why is securities licensing so confusing?

- ◆ Federal **and** state securities laws are complex . . .
 - Like reading the federal income tax code – **highly technical language**
 - These laws were designed to **protect the public**
 - These laws **flexibly define a “security”** to create broad jurisdiction
 - **Corporate stock** in a for-profit enterprise **is a “security” by statutory definition** and by U.S. Supreme Court decision
 - LLC membership interests, limited partnership interests, notes, and other instruments can be **a “security” depending on the facts** of the case
 - ◆ E.g., a passive investment in an enterprise run by others is usually a security (e.g., passively owned LLC membership or LLP interest)

- Interpretations by courts, SEC, states are usually **very fact-specific**
- Differences among federal securities law and **50 states laws** make broad generalizations difficult and legal compliance highly complex
- A few **limited federal and state exemptions** from securities broker-dealer registration have a narrow scope and the conditions vary widely
 - ◆ e.g., California has a broker registration exemption for M&A deals
 - ◆ But, if outside the exemption, a recent California securities law can impose liability for dealing with an unregistered broker
- There are **no broker registration exemptions** under both federal and state securities laws that fit most M&A and business broker activities

What is a "security"?

◆ Under the Securities Exchange Act of 1934:

The term "**security**" means any **note**, **stock**, treasury stock, security future, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral, royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, **investment contract**, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months,¹ exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

¹ This exception has been narrowly construed by the courts.

Can a “seller’s note” be a “security”?

- ◆ A “seller’s note” is common term for seller financing
- ◆ Analyze under both federal and state securities laws
 - **A “note” is presumed to be a “security” unless** it bears strong resemblance to instruments held by courts not to be securities
Reves vs. Ernst & Young 494 U.S. 56; 1990 U.S. LEXIS 1051 (1990)
 - For SEC analysis, see e.g., In the Matter of Gebhart, 2006 SEC LEXIS 93 (January 18, 2006); and see SEC Release No. 33-4412 (1961)
 - State securities regulators have said it could be a security under state law
 - For court cases, see American Law Reports (Federal), *Promissory Notes as Securities*, 39 ALR Fed 357, Section 9 (2004)

◆ Reves opinion's four-part "family resemblance" test:

- What are the **parties' motivations and purposes**?
 - ◆ Seller/issuer to raise/use capital and buyer to get an investment return?
 - ◆ Is repayment of the loan subject to the business risks of the issuer?
 - ◆ Vs. an short term substitute for cash in the ordinary course of business in a commercial transaction?

- Is there a **plan of distribution** resulting in **multiple note holders** where the **notes are transferable** and can be purchased/sold by public

- What are the **holder's expectations** about the instrument – was it sold to them as an "investment"

- Are there other risk-reducing regulatory systems (e.g., banking laws)

◆ Types of notes that are typically not securities:

- **Short term note secured by lien on a small business or its assets**
 - ◆ But, demand notes, renewable notes, or notes that automatically roll over are typically not treated as short term notes
- Short term note secured by an assignment of accounts receivable of the issuer (i.e., the acquired business) in commercial transactions
- Note for open-account debt incurred in normal course of business
- Consumer finance transactions

What are some “red flags”?

◆ A “seller’s note” could be a “security” when one or more of these and other factors exist:

- The note’s term is for more than 90 days (i.e., not “short term”)
- The note holder was not, and is not, active in the business
- There are multiple note holders (implying a “plan of distribution”)
- The notes are freely transferable (i.e., negotiable)
- There are “equity kickers,” “shared appreciation features,” adjustable rates, or terms that affect the risks/rewards to the note holder
- Convertibility and other features (e.g., puts, calls, options)
- The note is not secured by collateral (or perhaps under-secured)
- Expectation of the holder that the note is an investment in the business

. . . but it is an “exempt” security?

- ◆ “Exempt securities” and “exempt transactions” still involve “securities”
- ◆ Securities registration and related exemptions are different than broker-dealer registration
- ◆ Some exemptions from broker-dealer registration exist but do not fit the activities of most M&A intermediaries, so must be carefully analyzed

. . . the “sale of a business” doctrine?

◆ Once upon a time . . .

- The “**sale of business doctrine**” once held the sale of all of the corporate stock in a business was not a “security”
- This view was rejected by the U.S. Supreme Court in 1985
- In **Landreth Timber** the Court stated that “... whether it's one share or 100% of the shares, a security is a security is a security.”
- **Corporate stock** in a for-profit enterprise is a security under federal securities laws and most state securities laws

. . . but I only do small deals?

- ◆ There is no federal or state exemption from broker-dealer registration and regulation based on deal size
- ◆ Multiple states' securities laws may apply to parties, deals, and intermediaries crossing state lines
- ◆ The "intrastate" exemption from federal broker-dealer registration is very narrow, **but even then:**
 - Some requirements in Sections 15 and 17 of 1934 Act still apply
 - Antifraud prohibitions still apply to the intermediary's activities, and
 - At least one state's securities law still applies

How do the CBI and IBEC letters help?

- ◆ The IBBA persuaded the SEC to issue a “no-action letter” to Country Business, Inc. (CBI) in 2006
 - This is a significant accomplishment – there had been serious doubt about the continuing validity of the International Business Exchange Corporation (IBEC) no-action letter issued in 1986
 - SEC staff will not bring an enforcement action for failure to register against a business broker whose “asset deal” turns into a “stock deal” prior to closing
 - But, once the legal structure becomes a “stock deal,” the broker must limit his/her role in the transaction
 - <http://www.sec.gov/divisions/marketreg/mr-noaction/cbi110806.htm>

Why is the CBI letter so important?

- It covers frequently recurring scenarios for small business brokers
- Assures that the SEC staff will not bring an enforcement action where the stated conditions and limitations are satisfied
- Getting the letter issued shows the SEC's willingness to address these important questions because of the impact on small business
- **But**, the fact that the SEC would not relax the IBEC letter's conditions – **added the "small business" criteria** – underscores the SEC's concerns about unregistered brokers
- SEC is **unwilling to give a "free pass"** to exempt the activities outside of the CBI no-action letter's scope

◆ The CBI no-action letter “fits” under these conditions:

- Broker is engaged to **sell the whole business** as a going concern
 - ◆ The letter generally does not cover “buy-side” engagements or “transaction” engagements (representing neither the seller/buyer)
- The business **must be a “small business”** according to Small Business Administration standards (varies by industry)
- Broker may **advertise the business for sale**, but not its securities
- Broker’s compensation **paid in cash** (can be installments or contingent)

- Broker **cannot** advise about **valuing or issuing stock or securities**
- If the deal is or becomes a stock sale, **broker's role is limited to:**
 - ◆ transmitting documents between the parties;
 - ◆ valuing the assets of the business as a going concern;
 - ◆ providing the seller with administrative support; and
 - ◆ assisting the seller with preparation of financial statements
- If a stock sale, **all** of the stock must be sold
 - ◆ **CBI does not contemplate a retained ownership interest by the seller**
- Except for commercial loans, **broker cannot assist in raising capital** or obtaining third-party financing
- Only **UN-compensated** referrals to commercial lenders

What is an SEC “no action” letter?

- ◆ A no-action letter is an “ad hoc” statement of the SEC staff’s view about its bringing an enforcement case
 - The **same factual conditions must be met** to have the assurance about the SEC staff’s conclusion
 - No-action letters do not contain an SEC legal analysis and **do not have the same legal force** as a regulation, release or order
 - No-action letters are **not legally binding** on federal or state courts, state securities regulators, or private parties in civil litigation
 - **Carefully compare your circumstances** with the CBI no-action letter with qualified securities counsel

Survey of Our Audience . . .

- ◆ How many of you have read the CBI letter?
- ◆ How many have discussed it with counsel?
- ◆ How many believe that their M&A activities completely come within its facts and circumstances?
- ◆ How many are uncertain if some of their activities come within the CBI letter?

What if my activities don't fit within CBI?

- ◆ Activities that go beyond the stated fact pattern in CBI today **require full broker-dealer registration**
 - The securities transaction must be recorded on the firm's books and records
 - All transaction-related compensation must pass through the firm, and only be shared with other registered broker-dealers)

- ◆ Individuals must be registered with the broker-dealer
 - Several existing broker-dealers specialize in registering M&A intermediaries and business brokers
 - Stock sales and other securities transactions are run through the broker-dealer

◆ Full broker-dealer registration requires . . .

- SEC registration of the firm (renewed annually)
- FINRA membership for the firm (on-going)
- FINRA registration for all “associated persons” (renewed annually)
- State registration(s) of the firm and its representatives (renewed annually)
 - ◆ Where the firm or its representatives do business
 - ◆ Where the parties are located
 - ◆ Where solicitations or offers of a deal are made
 - ◆ Where the deal is closed

◆ Individuals must be . . .

- Registered with a registered broker-dealer and FINRA member
 - ◆ Pass a FINRA examination (typically a Series 7)
 - ◆ Satisfy continuing education requirements
 - ◆ Meet FINRA's standards for individual registration
- Registered through the firm with each state in which he/she does business
 - ◆ Pass a state securities law exam (Series 63 or 66)
 - ◆ Not be subject to any statutory disqualification

◆ BDs and their individual representatives cannot share compensation with unregistered persons

Does this scenario fit your firm?

◆ We assist small businesses with financing by:

- preparing a confidential information summary describing the business
- identifying potentially interested broker-dealers for capital raising
- arranging meetings with the broker-dealer
- identifying bank lenders potentially interested lending to the client
- arranging bank meetings and assisting with the loan application process

◆ We assist small business sellers in M&A by:

- preparing a confidential information summary describing the business
- identifying companies that might be interested in buying the client company
- assessing a buyer's interest in and ability to pay the owner's asking price
- arranging exploratory meetings between the buyer and seller
- client company's attorney spearheads negotiations and documentation

◆ We assist small business buyers in M&A by:

- identifying possible acquisition targets for a single buyer/client
- conducting preliminary information gathering interviews
- discussing proposed asking price and terms with potential seller
- preparing an acquisition profile for client company to screen the target
- client company's attorney spearheads negotiations and documentation

◆ We never handle a client's funds or securities

◆ Our compensation is a modest upfront retainer with a transaction-based success fee

◆ The SEC staff denied the request and, instead, said:

- “[B]ased on the general descriptions of the activities included in your letter, it appears that Hallmark Capital Corporation (“HallCap”) **would be required to register** with the Commission as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934
- SEC Letter to *Hallmark Capital Corporation*, 2007 SEC No-Act. LEXIS 509 (June 11, 2007)

Does anyone ever enforce these laws?

- Sophisticated parties, like private equity funds, and their attorneys are increasingly aware of the securities licensing requirements
- Attorneys are unable to give “clean” closing opinions about a party’s or a transaction’s compliance with all applicable laws
- Regulators respond to complaints – e.g., clients with disputes over fees or “deals gone bad” may call on the regulators for pressure
- Most state regulators are reviewing “Form D” filings in “Regulation D” private placement offerings to identify unregistered brokers
 - ◆ Regulators may “Google” the names they find reported

What's my risk if I just ignore this?

◆ Consequences of a registration violation may include:

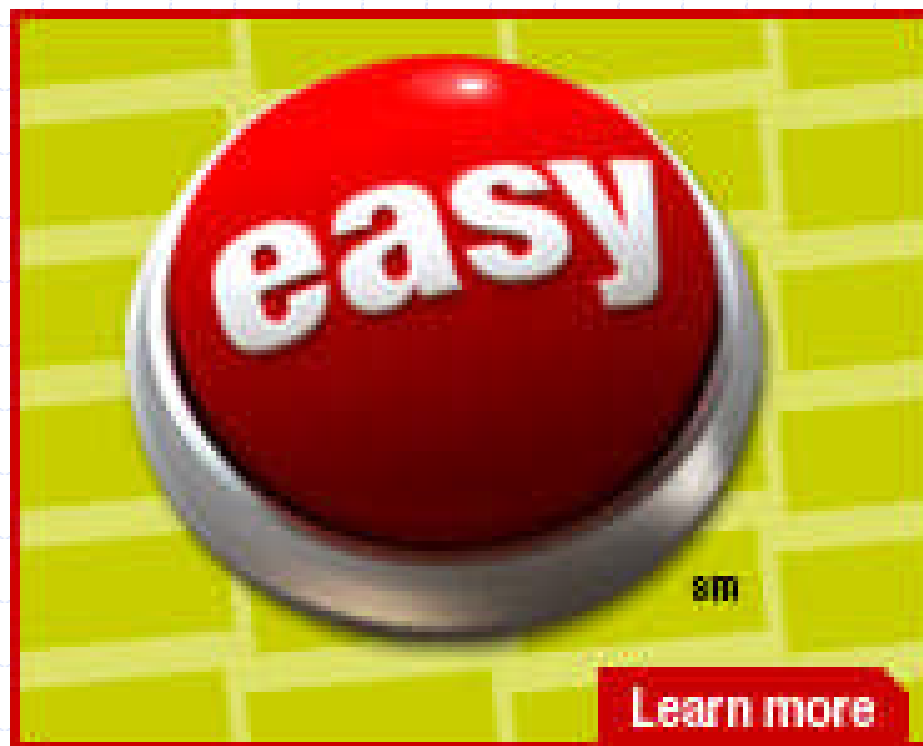
- **The broker may lose his/her fees**
- The deal may not close because “clean” legal opinions cannot be given
- Offering exemptions could be voided and the transaction rescinded
- If the deal craters, the broker may be liable for resulting damages
- Securities laws may impose personal liability on “control persons”
 - ◆ California Corp Code §25501.5 may imposes liability for dealing with unlicensed brokers (if not within the California M&A exemption)
- Securities regulators may bring an enforcement case – occurs where complaints are filed with the regulators and typically other wrong-doing

Survey of Our Audience . . .

- ◆ How many of you have lost an engagement for the lack of securities licensing?
- ◆ How many of you have lost or discounted your fees because you lacked securities licensing?
- ◆ How many know of others who faced these issues?



What is the solution to all of this?



Three solutions proposed to regulators

- ◆ AM&AA has launched a **3-pronged initiative**:
 - Support the ABA Task Force's "Private Placement Broker" proposal
 - Develop and advocate an "**M&A Broker**" proposal
 - Advocate the elevation of the **CBI No Action letter to a limited exemption**

- ◆ These three approaches address the full spectrum of intermediaries role in
 - Capital-raising for small businesses in private placements
 - M&A activities for the sale of a business in stock and asset deals
 - Main Street Business Brokerage for the sale of a small business

- ◆ These proposals would regulate an intermediary's activities between a fully-registered FINRA broker-dealer and a "CBI-type" asset sale broker

What has happened to date?

◆ ABA Task Force's **PPB proposal** presented the SEC, FINRA, and NASAA in 2005 and 2006

- Draft rules were submitted to the SEC staff for consideration
- On May 23, 2007, SEC proposed significant amendments to its rules to facilitate small business capital raising activities
- SEC Commissioner noted the need to address activities of PPBs and finders
- SEC legal staff is working on these issues

◆ AM&AA presented the **M&A Broker proposal** to the SEC and NASAA representatives in 2006 and 2007

- Proposal would primarily regulate M&A brokerage activities at the state level
- **No FINRA membership** required

What is the ABA PPB proposal?

◆ ABA “Private Placement Broker” proposal would:

- Create a new classification of brokers by SEC rule
- Allow the broker’s involvement in raising capital
- Allow participation in all aspects of the deal
- Allow sharing fees with other registered broker-dealers
- Simplify registration and individual testing
- Reduce formation and annual maintenance costs
- State rules would likely be needed to fully implement

What is the AM&AA proposal?

◆ The AM&AA “**M&A Broker**” proposal would:

- Develop a new, more simplified system for registration and limited regulation of intermediaries **only engaged in M&A deals**
- **Assure M&A Brokers that their deals and fees could not be challenged because of a broker registration violation**
- **Coordinate federal and state securities regulation of these M&A activities**
- **These rules would have the force of federal and state law, not just an interpretive no-action letter**

How would the new regulation work?

- ◆ As proposed an M&A Broker would be:
 - Exempt from federal registration but still subject to SEC jurisdiction
 - Exempt from FINRA membership
 - Subject to limited state registration and regulation

- ◆ SEC and states always retain “antifraud” jurisdiction in securities transactions

- ◆ SEC and states could examine and inspect the M&A broker and its securities-related activities

What could the M&A Broker do?

- ◆ As proposed, an M&A Broker could do all of the following in stock transactions (and, of course, asset transactions)
 - **Fully involved in an M&A transaction** not involving capital raising
 - Assisting on the **buy, sell, or independent side** of a business sale
 - ◆ Transferring all or part of the business where the buyer is to be actively involved in the business
 - ◆ Regardless of the size of the business
 - ◆ Regardless of the legal structure (stock or assets)
 - **Advising about structuring the deal** – stock, assets, ESOP, etc.
 - **Advising about the value of the business** (but not the market value of its stock or value in an initial public offering)

- **Negotiate the price and terms** of the purchase/sale
- **Advertise the business** itself for sale (but not shares of its stock)
- **Advertise a status** like “Registered M&A Broker/Advisor in [States]”
- Receive **cash and/or restricted stock as compensation**
- Receive **fully-disclosed referral compensation** from commercial lenders
- If permitted by FINRA rules (currently prohibited), receive referral fees from fully registered broker-dealers or PPBs

How would an M&A Broker be regulated?

As proposed, an M&A Broker would be required to:

- Initially file and annually renew a registration or notice filing with each state in which it conducts business
 - ◆ A notice filing could be made prior to a deal's closing if in a new state
 - ◆ Annual filing fees to be determined by each state
 - ◆ Registration filings at the "firm level" – no "individual level" filings
 - ◆ Certify that no owner/rep is subject to "bad boy" disqualifications
- Have a basic compliance manual with policies/procedures covering how to comply with federal and state securities laws
- Keep a "complaint file" for regulatory inspection

An M&A Broker would be required to:

- Preserve **basic books and records** about the firm and its deals
 - ◆ Make its books and records available for regulatory inspection
- Have a **written engagement** setting broker's terms and fees
- Provide the parties with **written disclosures** about:
 - ◆ The firm's and individual's professional credentials and experience
 - ◆ The broker's relationships with any other players in the deal
 - ◆ Conflicts of interest involving the deal or the parties

What restrictions on an M&A Broker?

◆ An M&A Broker could **not**:

- Participate in any aspect of raising capital from investors
- Organize groups of investors such as forming an equity fund
- Advise about or participate in public offerings of securities
- Deal with a “public shell company” (i.e., publicly traded company without significant business operations)
- Handle or have custody of the funds or securities in a deal
- Close a transaction on behalf of a client

How does this all fit together?

◆ AM&AA's website has a comparative "matrix":

- www.amaaonline.com Breaking News
- Summarizes current securities law requirements – "book ends"
- Summarizes both proposed classifications (two middle columns)
- Each classification to the right permits only a subset of all activities permitted in the classifications to the left
- Creates a fully integrated spectrum of federal/state securities regs

Description	Fully-registered Broker-Dealer	Proposed Private Placement Broker	Proposed M&A Broker	Asset Sale Business Broker
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 BD'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 private placements of debt and equity securities with accredited investors and qualified institutional buyers; ■ Advice about using/referrals to fully-registered BDs; ■ All M&A broker activities; and ■ All asset sale BB activities. 	<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

Why get involved with the process?

- ◆ Federal and state regulators are actively evaluating how to resolve these issues
- ◆ Some states are already acting on “finder” activities and others are proposing rules
- ◆ The ABA PPB Task Force, AM&AA, and IBBA have helped to shape the solution by offering concepts and ideas that work in the “real world” setting

What are the next steps?

◆ Continue dialog with SEC staff and NASAA reps

- Meetings in April 2007, November 2006, and September 2006 (started)
- Associations' Summit in Chicago 7/11/07
- Presented MAB proposal at SEC Small Business Forum 9/2007
- NASAA Annual Meeting in Seattle 10/2007
- SEC staff feedback on investment adviser aspects of proposal in 11/2007
- MBBI panel in Chicago on 1/25/08
- Presented revised MAB proposal, plus CBI limited exemption proposal at Spring 2008 NASAA meeting
- Fall 2008 SEC Small Biz Forum
- Fall 2008 NASAA meeting

◆ Model M&A firm disclosure form

◆ Model M&A firm registration form

◆ Addressing state concern for minimum professional education and testing about securities laws

How do I financially support the cause?

- ◆ Read the information posted on the AM&AA website
- ◆ Respond to the Invitation to Sponsor
- ◆ Call any AM&AA Licensure Task Force Member to discuss how to best support the initiative
- ◆ Send your financial support to:

**AM&AA Marketplace Leadership Fund
Alliance of Merger & Acquisition Advisors
150 North Michigan, Suite 2700
Chicago Illinois 60601**

Questions & answers

- ◆ What do brokers have to do today to comply with current law in transactions involving “securities”?
 - **Step 1:** Does the SEC’s **Country Business (CBI)** no-action letter fit?
 - ◆ Are the broker’s activities within its scope?
 - ◆ Document how the firm fits within the CBI letter
 - ◆ Understand the limitations of the CBI no-action letter
 - **Step 2:** If the activities are **outside the CBI letter’s scope**, then:
 - ◆ The firm must be a registered broker-dealer and FINRA member
 - ◆ The individuals must be registered with the BD
 - ◆ All transaction-related compensation must go through the BD
 - ◆ No compensation-sharing with unregistered persons

More questions & answers

- ◆ Does a securities broker-dealer registration supersede other state licensing laws?
 - **No, multiple licensing laws may apply to the same activities.**

- ◆ Don't some states already do this? (e.g., Illinois Business Broker Act)?
 - **Securities laws are different than business broker laws**
 - **Typically, state securities laws apply in addition to other state licensing laws for real estate brokers, mortgage brokers, business opportunity brokers, franchise brokers, etc.**
 - **A few states have harmonized their professional regulations**

More questions & answers

- ◆ If you have to be registered in each state where you do business, doesn't that mean really you have to be registered in all 50 states?
 - **The jurisdiction and reach of state securities laws is complex**
 - **Typically, jurisdiction depends on . . .**
 - ◆ **Where offers to buy or sell are made**
 - ◆ **Where those offers are accepted, and**
 - ◆ **Where the sale occurs (e.g., where the deal is closed)**



Exhibits and other resources

Additional resources

◆ SEC registration and regulation

- Guide to Broker-Dealer Registration
- sec.gov/divisions/marketreg/bdguide.htm

◆ FINRA membership and regulation

- FINRA "How to Become a Member" Guide
- finra.org/RegistrationQualifications/MemberFirms/index.htm

◆ State registration/licensing

- nasaa.org/industry_regulatory_resources/broker_dealers/520.cfm

Why are things happening NOW?

- **ABA Private Placement Task Force** presented a comprehensive report to the SEC on unregistered intermediaries in 2005
 - ◆ *"Report and Recommendations of the Task Force on Private Placement Broker-Dealers,"* 60 Business Lawyer 959 (May 2005)
- The SEC Small Business Forums in 2004, 2005, and 2006 have identified this as a critical issue to small business development in the U.S.
- SEC staff acknowledge that the need for rulemaking has been established and held a breakout session at the 2006 Small Business Forum on 9/29/06
- Michigan and now Texas, South Dakota, and Minnesota regulate "finder" activities – California is considering new regulations
- NASAA (state regulators) has established a "Finders" Project Group

AM&AA accomplishments to date

- ◆ Completed drafting of a comprehensive concept outline for a registered M&A Broker, with limited exemption from FINRA registration/ licensing for middle market M&A advisors and intermediaries
- ◆ Recorded our full support for the ABA PPB proposal and presented our concept of a registered M&A Broker at the SEC Forum for Small Business Capital Formation, Washington, DC on Sept 29th
- ◆ Received initial expression of support with a significant pledge of financial support from IMAP
- ◆ Returned to Washington, DC for a private meeting with the senior SEC staff, with responsibility for drafting new regulation in this area to discuss and answer their questions regarding both proposals

Accomplishments to date (continued)

- ◆ Presented the AM&AA concept of a registered M&A Broker to the chair of NASAA's "Finder's" Project Group
- ◆ Developed a legal analysis of the pluses and minuses of the CBI No Action Letter as it relates to middle market M&A transactions
- ◆ Developed a matrix highlighting the allowed activities, restrictions and regulatory requirements for PPB & registered M&AB vis a vis a full service FINRA Broker Dealer and a Main Street Business Broker operating under the IBEC and CBI No Action Letters, which has been provided to the SEC senior staff and to the chair of NASAA's "Finders" Project Group

Accomplishments to date (continued)

- ◆ Met with selected state securities commissioners and their staff, who agree with the need to take action in this area and with the approach of working through NASAA to finalize these proposals
- ◆ Conferred with leaders of the ABA Private Placement Broker Task Force to confirm they understood and were generally in agreement with our registered M&AB proposal and see it as complementary and not in any way threatening to their own PPB proposal
- ◆ Received financial support and endorsements from IBBA, CABI, MBBI, and other associations
- ◆ Other industry groups are currently reviewing these proposals with an eye to providing additional support, including, IBBA, Midwest Business Brokers and Intermediaries (MBBI), Business Brokers of Florida (BBF), and others

Accomplishments to date (continued)

- ◆ Held a follow-up meeting with the NASAA “Finder’s” Project Group to discuss their feedback and to determine next steps
- ◆ Held a follow-up meeting with the SEC senior staff to discuss their feedback and to determine next steps
- ◆ Hosted a day-long industry conference in Chicago on 7/11/07 for SEC and NASAA Finders Project Group representatives on the range of M&A activities that would be covered by these proposals
- ◆ Drafted and submitted proposed SEC and state model M&A broker rules to SEC staff and NASAA Finders Project Group
- ◆ Met with the NASAA Finders Project Group and SEC staff at NASAA’s 2007 Annual Fall Meeting in Seattle, Washington
- ◆ Met with NASAA Finders Project Group & SEC staff at NASAA’s 2008 Joint Spring Conference in Washington, DC

Hugh Makens, Of Counsel Warner, Norcross & Judd LLP



Hugh Makens has been involved in the securities industry for over 35 years as an attorney, regulator and advisor. He was a Director at the Michigan Corporation & Securities Bureau for the Michigan Department of Commerce (1972-1978) and was a Trial Attorney with the U.S. Securities & Exchange Commission (1966-1972). For the past 24 years he has represented broker-dealers, investment advisors, issuers, regulatory authorities and industry professionals in conjunction with compliance with securities regulatory requirements, investigations and regulatory proceedings. He is chair of the Firm's Broker-Dealer/Investment Advisers Practice Group and is Co-Chair of the Securities practice of Warner, Norcross & Judd LLP.

- ◆ Member of the Market Operations Review Committee for Nasdaq Stock Market, Inc. (Nasdaq) (Washington, D.C.)
- ◆ Member of the American Bar Association Special Committee to Study Market Structure, Listings Standards and Corporate Governance, proposing governance best practices and disclosure policies for the NYSE and Nasdaq (2000-02)
- ◆ Member of the American Bar Association State Regulation of Securities Committee
 - Chairman (1983-86)
 - Subcommittee on Liaison with Securities Administrators and NASD
 - Subcommittee on Merit Regulation
 - Subcommittee on Private Offering Exemption and Simplification of Capital Formation
- ◆ Member of American Bar Association Federal Regulation of Securities Committee
 - Subcommittee on Market Regulation
 - Subcommittee on Small Business
 - Subcommittee on Securities of Insurance Companies
- ◆ Education
 - Northwestern University School of Law J.D. 1964
 - Michigan Technological University B.S.B.A. 1961 cum laude

Hugh Makens - Partial List of Publications

- ◆ "Pitfalls of Involvement in Securities Sales to or for Clients," *The Michigan CPA*, May-June 1978, Volume XXIX, No. 6
- ◆ "Defending an Administrative Proceeding," Regulation of Capital Formation and Securities Transactions, Practising Law Institute, 1983
- ◆ "Finders," State Regulation of Capital Formation and Securities Transactions, Practising Law Institute, 1983
- ◆ "Who Speaks for the Investor? An Evaluation of the Assault on Merit Regulation," *University of Baltimore Law Review*, Spring 1984, Volume 13, No. 3
- ◆ "Supervision, Internal Investigations and Settlement Procedure," ALI-ABA Course of Study, Broker-Dealer Regulation, January 10, 1991, Vol. C-578, Pg. 83
- ◆ Makens & Wright, "Brokerage Firms: Supervision, Internal Investigations, and Settlement Procedures (Part 1)," 16 ALI-ABA Course Materials Journal 19 (August 1991)
- ◆ State Regulation of Securities Committee, "Review of Developments in State Securities Regulation,"—Makens, Hugh H. & Klein, R. Wayne, "The Prudential Solution and National Securities Regulatory Settlements," *The Business Lawyer*, November 1995, Vol. 51, No. 1, Pp. 256-282
- ◆ Makens, Hugh H., "A Look Into the Future of Investment Adviser Regulation," *NSCP Currents*, November/December 1996, Page 1
- ◆ Makens, Hugh H., "Variable Product Stumpers," *NSCP Currents*, January/February 2000, Page 1
- ◆ Makens, Hugh H., "Finders in No-Man's Land," *The Blue Sky Bugle*, Vol. 2002, No. 1, March 2002
- ◆ Makens, Hugh H., and Larson, James L., "Fair Value Pricing," *NSCP Currents*, May/June 2003

Shane Hansen, Partner Warner, Norcross & Judd LLP



Shane Hansen practices in the area of financial services regulation of banks, broker-dealers, investment advisers, financial planners and money managers. He regularly 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 and is Co-Chair of the Broker-Dealer and Investment Adviser Practice Group at Warner, Norcross & Judd LLP.

◆ Securities Representative Experience

- Co-chair, State Liaison Subcommittee, Committee on State Securities Regulation, ABA Business Law Section
- Acquisitions, membership and change of control applications with FINRA, federal, and state regulators
- Analysis of banking powers and regulations governing various banking-related investments and activities and Securities offerings by banks and bank holding companies
- Broker-dealer and investment adviser compliance issues
- Compliance and procedure manuals, new account forms, client services agreements and representative agreements
- Formation, registration, and regulation of broker-dealers and investment advisers under federal and state securities laws and FINRA rules
- Response to regulatory inspections, complaints, and inquiries
- Responsible for formation and registration of broker-dealers and investment advisers
- Responsible for purchase and sale transactions involving 30+ bank and thrift branches with total assets and liabilities over \$700 million

◆ Education

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