

SEC's New Licensing Requirement for M&A-Related Activities and Its Impact on the BV Profession

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As business valuation professionals, we are often asked to provide opinions of value when business owners are considering a sale of the business. As a result, business appraisers are often the first professional advisors that the owners consult with in regard to the sale. For practices like ours, it is not unusual for the role of the business appraiser to expand as the transaction progresses. The additional work might include preparing a financing memorandum, identifying potential buyers, assisting in price negotiations, and suggesting a deal structure. Later, the appraiser (now turned financial intermediary) might be asked to assist in locating financing for the transaction. In addition, BV professionals in general are asked to provide fairness opinions and opinions as to an appropriate exchange ratio for a merger.

That said, appraisers often fail to consider the regulatory environment when providing services that seem to be a logical outgrowth of business valuation. The authors believe that appraisers ignore the regulatory environment at their peril. While the exact activities that require a person to be associated with a broker-dealer registered with the SEC and FINRA are not 100% clear, the authors believe that FINRA's new Series 79 license and the recent focus on increasing financial regulation are indicators that the days of the unlicensed investment banker may be numbered.

Background

The Securities and Exchange Commission (SEC) was created by the Securities Exchange Act of 1934 (the "1934 Act") to enforce federal laws regarding the securities industry. As a practical matter, though, the industry is regulated by self-regulatory organizations (SROs), and the largest SRO is the Financial Industry Regulation Authority (FINRA). FINRA is responsible for the regulation and oversight of the stock markets (NYSE, NASDAQ, and AMEX) as well as securities firms and their associated persons. However, SROs have no authority to act against nonmembers. If you aren't a member of FINRA, FINRA cannot take action against you, but the SEC can.

Throughout this article we will discuss items that require registration with FINRA or the SEC, or both. What we mean by this is that a firm is required to both register with the SEC as a broker-dealer and to become a member of an SRO (in this case, FINRA) as a broker-dealer.

Do You Need to Register?

Based on the SEC Guide to Registration shown in Sidebar 1, we believe that the following are the most relevant questions when determining whether the SEC requires registration as a broker-dealer (and membership in FINRA):

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1. Is there involvement in Series 79 activities as laid out in its definition of investment banking and its curriculum? If so, how often?
2. Can the SEC consider this involvement “effecting transactions”?
3. Are there contingent or success-based fees? Are those fees significant?
4. Is the involvement limited to that which is permitted for small business brokers?

Series 79 Activities

The Series 79 is a FINRA licensing category for investment bankers. While the Series 79 did not expand existing SEC jurisdiction over broker-dealers, it is relevant for non-FINRA members in that the SEC approved the licensing category,¹ and the category provides a new level of clarity to, or emphasis on, the types of activities that are considered to be investment banking and thus likely to trigger a requirement for broker-dealer registration. (See Sidebar 2.) Prior to the Series 79, professionals who performed M&A-related services and wanted to become licensed with FINRA had no clear licensing examination that tested topics related to their activities. Thus, they would take the Series 7 exam, which is for general securities representatives. Very few questions on the Series 7 exam apply to M&A-related activities.² In contrast, the Series 79 exam focuses on mergers and acquisitions and activities related to providing transaction advisory services.³

- 1 FINRA Regulatory Notice 09-41. *Investment Banking Representative: SEC Approves Rule Change Creating New Limited Representative— Investment Banker Registration Category and Series 79 Investment Banking Exam.* finra.complinet.com/net_file_store/new_rulebooks/fi/i/finra_09-41_amended2.pdf, accessed 2/1/10.
- 2 Content Outline for the General Securities Registered Representative Examination (Test Series 7). FINRA. www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/industry/p038201.pdf, accessed 2/1/10.
- 3 Investment Banking Representative Qualification Examination (Test Series 79) Content Outline. FINRA. www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/industry/p119446.pdf, accessed 2/1/10.

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Prior to the Series 79, the last licensing category that the SEC approved was the Series 82. The 82 is a license designed for those who engage in private securities transactions. The SEC approved this new license and its licensing exam curriculum in 2001.⁴ The 82's curriculum briefly mentions private investments in public equities (PIPEs).⁵ Recent actions of the SEC against unregistered persons that engaged in PIPE advisory activities provide insight into how the SEC may view the performance of investment banking activities by unregistered persons or firms.

In June 2009, the SEC found that Ram Capital and its principals and employees had willfully violated the 1934 Act by advising on PIPEs from 2001 to 2005. Ram and its personnel were forced to refund more than \$1 million in fees, and the company, its principals, and its employees were suspended or censured.⁶

In 2007, the SEC found that Duncan Capital and its unlicensed principal engaged in financial advisory services for PIPEs from 2003 to 2005 and, consequently, willfully violated the 1934 Act. Duncan and its principals and employees were required to pay \$9.6 million, which included fees previously charged to its clients for the improper activities and fines. Duncan, as well as a related entity and Duncan's employees and principals, were all fined, barred and/or censured.⁷

Both cases are examples of SEC enforcement actions against firms engaging in activities once thought to fall outside the oversight of the SEC, and it appears that once a FINRA license related to the activity became available, the SEC began reacting as if the license were required. By this logic, the SEC may take the position that a Series 79 license is required for investment banking activities.

NASD Rule 1032(i) requires individuals engaged in "investment banking" activities to have a Series 79 license. The rule defines investment banking as [emphasis added]:

Advising on or facilitating debt or equity securities offerings through a private placement ... including but not limited to ... marketing, structuring, ... and pricing of such securities and managing the allocation ... activities of such offerings, or advising on or facilitating mergers and acquisitions, ... 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.*¹

Effecting Securities Transactions

The SEC is empowered to bring action against individuals or businesses that it perceives to be operating in the realm of broker-dealer activities. This power is laid out in the 1934 Act, where "broker" and "dealer" are defined. The 1934 Act defines brokers as "Any person [or entity] engaged in the business of effecting transactions in securities for the account of others."⁸ While this language may seem unrelated to most M&A activities that might involve business valuation professionals, NASD Rule 1032(i)'s definition of "investment banking" shines some light on what the SEC considers "effecting transactions." The definition not only includes the transfer of the equity of a company, but also asset sales.

4 NASD Notice to Members 01-39. *New Registration Category—Rules and Examination: SEC Approves Proposed Rule Change Establishing New Limited Registration Category for Private Securities Offerings; Related Qualification Examination (Series 82) Is Effective.* www.complinet.com/file_store/pdf/rule-books/nasd_0139.pdf, accessed 2/1/10.

5 Private Securities Offerings Qualifications Examination (Test Series 82) Study Outline. FINRA. www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/industry/p011064.pdf, accessed 2/1/10.

6 SEA of 1934 Release No. 60149, June 19, 2009. Administrative Proceeding File No. 3-13524, in the Matter of Ram Capital Resources, LLC, Michael E. Fein, and Stephen E. Saltzstein. www.sec.gov/litigation/admin/2009/34-60149.pdf, accessed 2/1/10.

7 U.S. Securities and Exchange Commission Litigation Release No. 20809, November 14, 2008. www.sec.gov/litigation/litreleases/2008/lr20809.htm, accessed 2/1/10.

8 The Securities Exchange Act of 1934 [As Amended through P.L. 111-72, Approved Oct. 13, 2009]. www.sec.gov/about/laws/sea34.pdf, accessed 2/1/10.

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The 79 curriculum (see Sidebar 2) gives us some guidance as to what the SEC considers “effecting,” but there is further evidence that the SEC has an all-encompassing definition.

Regulatory activity by the SEC and FINRA is increasing in the form of stricter rules and increased enforcement activity. Recently, the SEC and FINRA have been criticized for a lack of scrutiny when examining broker/dealers—criticism

that has come as a reaction to the recent financial collapse and the discovery of, among others, Bernard Madoff’s Ponzi scheme.

The SEC reacted by bringing a high-profile suit against Goldman Sachs and requesting that Congress require private equity groups and other private funds to register for oversight with the SEC. In July 2009, Andrew Donohue, the director of the Division of Investment Management at

Sidebar 1: SEC Guide to Registration

The SEC’s *Guide to Broker-Dealer Registration* provides informal guidance and sets forth factors to help determine whether individuals and businesses need to register as a broker-dealer. The Guide mentions several types of advisors, including [Emphasis Added]:

- **“Finders,”** “business brokers,” and other individuals that engage in the following activities:
 - Finding investors or customers for, making referrals to, or splitting commissions with registered broker-dealers, investment companies (or mutual funds, including hedge funds), or other securities intermediaries;
 - Finding investment banking clients for registered broker-dealers;
 - **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;
 - **Finding buyers and sellers of businesses (i.e., activities relating to mergers and acquisitions where securities are involved);**
- Investment advisers and financial consultants;
- Persons that market REITs, such as tenancy-in-common interests, that are securities;

- Persons that act as “placement agents” for private placements of securities;
- **Persons that effect securities transactions for the account of others for a fee, even when those other people are friends or family members;**
- Persons that provide support services to registered broker-dealers; and
- Persons that act as “independent contractors,” but are not “associated persons” of a broker-dealer.

This guide also suggests that “some of the questions you should ask to determine whether you are acting as a broker” are [Emphasis Added]:

- Does your compensation for participation in the transaction depend upon, or is it related to, the outcome or size of the transaction or deal?
- Do you receive trailing commissions, such as 12b-1 fees? **Do you receive any other transaction-related compensation?**
- **Are you otherwise engaged in the business of effecting or facilitating securities transactions?**
- Do you handle the securities or funds of others in connection with securities transactions?

In the “Do You Need to Register” section of this article, the authors have interpreted these questions in light of recent regulatory developments.*

* U.S. Securities and Exchange Commission. Guide to Broker-Dealer Registration. Division of Trading and Markets, April 2008. <http://www.sec.gov/divisions/marketreg/bdguide.htm>, accessed 9/3/10.

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the SEC, urged Congress to require advisers to private funds such as private equity groups to register with the SEC as investment advisers. Donohue said that the current regulatory situation, under which the SEC has limited oversight of hedge funds and private investment pools, presented a “significant regulatory gap in need of closing.” Part of Donohue’s reasoning was that, without regulation of such entities, the SEC is unable to regulate a majority of the M&A transactions that take place.⁹

In addition to Donohue’s testimony, Kristina Fausti from the SEC Division of Trading and Markets stated:

Even if you’re getting a flat fee ... some people have thought in the past there might be one bite at the apple or maybe you’re only talking about a one-time introduction. The [SEC] staff takes, I don’t want to say a grim view, but we really don’t believe that. We believe that a lot of people are out there to make money and to be “in the business” [of effecting transactions].¹⁰

Both Donohue’s and Fausti’s statements indicate the SEC staff desires to have a broad interpretation of the activities (and, consequently, number of M&A advisors and advising firms) that require registration with the SEC, whether through registration as an investment adviser or as a broker-dealer. The recent Frank-Dodd Act certainly gives the SEC the ability to start moving in that direction.

The Frank-Dodd Wall Street Reform and Consumer Protection Act was signed into law on July 21, 2010. It amended the Investment Advisers

9 Testimony Concerning Regulating Hedge Funds and Other Private Investment Pools by Andrew J. Donohue before the Subcommittee on Securities, Insurance and Investment of the U.S. Senate Committee on Banking, Housing and Urban Affairs, July 15, 2009. www.sec.gov/news/testimony/2009/ts071509ajd.htm, accessed 2/1/10.

10 U.S. Securities and Exchange Commission Twenty-Seventh Annual SEC Government-Business Forum on Small Business Capital Formation Program Record of Proceedings, November 20, 2008. www.sec.gov/info/smallbus/sbforumtrans-112008.pdf, accessed 2/1/10.

Sidebar 2: The Series 79 Curriculum

Many sections of the 79’s curriculum relate directly to activities that many BV professionals perform in connection with a merger or acquisition. These include:

- Due Diligence Activities: procedures, duties, and relevant regulatory requirements associated with performing due diligence and facilitating it from the buy- or sell-side.
- Fairness Opinions: processes and relevant rules for providing fairness opinions.
- Analysis and Evaluation of Data: how to analyze companies and various valuation metrics, ratios, and other data that should be analyzed when performing advisory services or a fairness opinion.
- Sell-Side and Buy-Side Advisory: processes involved in performing sell-side and buy-side advisory services.
- Closing Transactions: specifics for facilitating the closing of a transaction.
- Financial Restructurings/Bankruptcy: procedures for advising in connection with financial restructurings and bankruptcy.
- Other Relevant Regulatory Issues: other SEC rules, laws, and ethical standards that pertain to M&A transactions and advisors’ roles in those transactions.

The history of the Series 82 leads the authors to believe that the SEC intends to support at least some of these items in the near future by bringing actions against unregistered activities.

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Sidebar 3: Investment Advisers

The Investment Advisers Act of 1940 (the "IA Act") details the regulations surrounding investment advisers. While the IA Act does not speak specifically to broker-dealers and the advisory services that are the subject of this article, it does have an interesting caveat that we believe is worth mentioning. Investment advisers are defined in the act as:

Any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities....

While this definition is generally interpreted to mean the wealth advisors and financial planners that we all think of as investment advisers, there is an interesting exception to the definition (and requirement to register with the SEC as an investment adviser). The IA Act excludes certain professionals from the definition of investment adviser:

Any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession....

We are aware of many business valuation professionals and CPAs who feel a similar exemption exists for the requirement to register as a broker-dealer. Although it is not a specific exception in the laws for registration as a broker-dealer, these people could be correct that this is a general way that the SEC looks at whether a firm needs to register as an investment adviser or broker-dealer.

Central to whether this type of thinking about exemptions from registration applies to your practice is the definition of "incidental to the practice of his profession." Can a CPA that regularly distributes investment advice or advertises a service of advising on investments argue that those services are "incidental"? In the same light, can a business appraiser who advertises her transaction advisory or investment banking services and charges a fee for those services argue that they are "incidental" to her practice of business valuation?

Act of 1940 (see Sidebar 3) to remove the exception that private equity firms (who are often the buyers in the type of middle-market, private M&A transactions that BV professionals get involved in) previously relied on to exempt them from registration with the SEC. The act itself states that such private funds have increasing importance to and impact on the global financial system and may pose "systemic risk."¹¹

The act also increases broker-dealer regulation and SEC oversight in general, specifically

mentioning nearly 250 new rules that must be created by the SEC and other regulatory organizations. The SEC will be responsible for writing 95 of these rules, which does not include the surrounding regulations and interpretations that will be created to clarify the original 95 rules. In addition to those, the SEC is responsible for 17 one-time and five periodic studies at the end of which the SEC will report to lawmakers with suggested additional regulatory actions. The authors believe that the trend toward increased registration and regulation of investment advisers and broker-dealers is likely to put investment bankers under increased scrutiny, as well.¹¹

Transaction-Based Compensation

Transaction-based compensation is another key factor in determining whether to register. While BV

11 Davis Polk. Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Enacted into Law July 21, 2010. July 21, 2010. www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf, accessed 9/2/10.

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professionals are often prohibited by their professional organizations' ethics standards from such compensation when providing opinions of value, many firms accept success fees when providing sell or buy-side advisory services. Transaction-based compensation was one of the factors that the SEC considered in the Ram Capital and Duncan Capital cases. In another example, *Torsiello v. Sunshine*, Torsiello Capital Partners brought suit against Sunshine State Holding Corp. for breach of a contract in which Sunshine was to pay Torsiello a success fee for providing sell-side advisory services. Sunshine's counter argument was that Torsiello could not legally perform its duties because it wasn't a registered broker-dealer. The court found in favor of Sunshine. Torsiello was not able to receive its success fee and had to refund its \$50,000 retainer, plus interest. In its decision, the court referenced the 1934 Act: "[every] contract made in violation of the SEA or the performance of which involves such violation 'shall be void.'" The court also stated, "One of the hallmarks of a broker is the receipt of transaction-based compensation."¹²

In the same speech given by Fausti (mentioned above), she stated, "... if you're getting a transaction-based fee, we consider you engaged in the business." Fausti even stated that if you want to receive a transaction-based fee for referral to a registered broker-dealer, "Unless you're a registered person associated with the broker-dealer, you cannot receive [contingent] fees." As mentioned in the previous section, she stated that even a flat fee is questionable if your involvement includes connecting the parties involved.¹⁰

The Small Business Broker

There is, however, an SEC no-action letter in which the SEC outlines a potential exception to broker-dealer registration. While a no-action letter is not a guaranteed exception, it does represent an example of a specific case in which the SEC

staff stated that they would not recommend action against the unregistered activity. In the Country Business Inc. no-action letter, the SEC stated that, in order for this particular exception from registration to apply, the client must meet the small business standards of the Small Business Administration (SBA), which in some industries is a very limiting factor. Also, the business must be a going concern; only assets of the business can be offered for sale, and if equity is sold, the business must sell all of its equity. The advisor can only be involved in transmitting documents between parties, valuing the assets of the business, providing the seller with administrative support, and assisting the seller in preparation of financial statements. The advisor must not offer advice to the purchaser or seller about the value of the stock or debt (something that BV professionals will, by their nature, find hard to do) or the structure of the deal, have the power to bind either party in a transaction, advise on the formation of a buying entity, or assist the purchasers with financing.¹³

Other Considerations

Registering with the SEC and becoming a member of FINRA is a long, expensive, and complicated process. It took us seven months to do it on our own, and from what we've seen elsewhere, that's about how long it takes even if you use a compliance consultant (often a former FINRA/NASD insider). FINRA and the SEC's rules are very complex and designed for the big broker-dealers on Wall Street. At times, the authors have felt that our business, which is primarily limited to transaction advisory services, is like fitting a square peg into a round hole when it comes to FINRA and SEC regulations. However, when it came down to it, our transaction advisory services were becoming a significant percentage of our revenue, and we had become thoroughly involved in the transaction process. We also considered that there may be a marketing advantage to having a broker-dealer registration through FINRA.

¹² *Torsiello Capital Partners LLC v. Sunshine State Holding Corporation*, 2008 NY Slip Op 30979(U). April 1, 2008. Docket Number 0600397/2006, Judge Herman Hahn. burch.typepad.com/_files/unregistered_broker_case_408_ny.PDF, accessed 2/1/10.

¹³ U.S. Securities and Exchange Commission. Country Business Inc. Request for No-Action Relief, November 8, 2006. www.sec.gov/divisions/marketreg/mr-noaction/cbi110806.htm, accessed 2/1/10.

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There is a lower-cost option available to BV professionals, which is to affiliate with a current registered broker-dealer (as we did for a few years). The downside of this option includes sharing your fees, lack of control of the business, and no direct communication with regulators, which typically leads to a lack of understanding of the relevant regulations.

The authors believe BV professionals should carefully consider their involvement in M&A transactions. BV professionals who have become actively involved in M&A-related activities, as we have been, run a risk of crossing into the SEC's definition of an unlicensed broker-dealer. As with most regulatory issues, one should seek legal counsel to help determine the most appropriate actions.

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