

**PROPOSED MODEL STATE RULES  
REGULATING “M&A BROKERS” AND  
INTERMEDIARIES IN SMALL BUSINESS SALES**

(Updated 3/20/08)

**Introduction**

The Alliance of Merger and Acquisition Advisors (“*AM&AA*”), in conjunction with other professional associations of mergers and acquisitions intermediaries and business brokers (“*M&A Brokers*”), offers the following model rules language (the “*State M&A Broker Rules*”) for consideration by the North American Securities Administrators Association (“*NASAA*”) to implement state-level rules and regulation that complement proposed federal rules (the “*Federal M&A Broker Rules*”) that have been proposed to the Securities and Exchange Commission (“*SEC*” or “*Commission*”).<sup>1</sup> Together, these federal and complementary states rules would create a regulatory regimen for M&A Brokers previously described in the Concept Outline For a Proposed Federal Broker Registration Exemption For Certain Business Brokers and M&A Intermediaries (Rev. 3/17/07) (the “*Concept Outline*”).<sup>2</sup> The Concept Outline explains in greater detail the rationale and impetus behind the proposed Federal and State M&A Broker Rules. That explanation will greatly aid in understanding the context of these proposed rules.

A primary objective of the Federal and State M&A Broker Rules is to enhance investor protection by improving understanding and compliance with federal and state securities laws. This would be accomplished by creating a new classification of “broker” under the Securities Exchange Act of 1934, as amended (the “*Securities Exchange Act*”), in coordination with state securities laws, that will appropriately regulate the securities-related activities of M&A Brokers in mergers, acquisitions, and business brokerage transactions (“*M&A transactions*”) in view of the limited scope of their activities and the public interest in facilitating the free flow of capital to and from existing small business owners.

This proposed rulemaking ranked among the top three recommendations of the Final Report of the 2006 SEC Government-Business Forum on Small Business Capital Formation and similar recommendations were made in the reports from the 2004 and 2005 Forums. The proposed rules would complement other regulatory reforms to benefit small businesses announced by the SEC on May 23, 2007, Proposed Modernization of Smaller Company Capital-Raising and Disclosure Requirements, Press Release 2007-102. If the proposed rules are adopted, small business sellers and buyers would be better assured of receiving assistance from legitimate, compliant professional advisors in their sale transactions. The number of small business sale transactions has been increasing as baby boomers seek to retire and liquidate what is typically their single largest investment. While most of those transactions are legally structured as asset sales which are generally outside the scope of federal and state securities regulation, some of those transactions involve securities and, accordingly, are within the jurisdictional scope

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<sup>1</sup> The proposed Federal and State M&A Broker rules have been shared with both the SEC and NASAA.

<sup>2</sup> The Concept Outline and the Comparison of Current and Proposed Regulation of Broker-Dealer Activities can each be downloaded from the AM&AA’s website at: <http://www.amaaonline.com/amArticle.asp>

of those laws and related rules. It is critically important to understand that most, if not all, *M&A Brokers* primarily handle asset sale transactions but, in order to properly advise and serve their clients' needs and objectives, also need to be able to handle transactions where the sale of a business or business unit is accomplished through the sale of securities. In light of that, the proposed regulatory regimen is designed to be efficient and cost-effective for both regulators and *M&A Brokers*.

Another objective of the Federal and State M&A Broker Rules is to create a uniform system of state rules, to coordinate with the federal rule, so that the system of regulation is well defined and commonly understood by M&A Brokers, business buyers and sellers, their accountants, legal and financial advisers, and the general public. Uniformity will also aid in efficient administration of the rules and reduce costs for regulators and regulated persons. Therefore, the Commission's rules would be complemented at the state level through model rulemaking coordinated through NASAA and recommended for adoption by the states. This rulemaking proposal is patterned after the bifurcated regulatory model created by Congress, and implemented by the SEC and the states, for the regulation of investment advisers pursuant to the National Securities Markets Improvement Act of 1996. We believe this regulatory regimen can be created by federal and state rules within the agencies' existing statutory authority.

As explained in the Concept Outline, an M&A Broker could act as a "broker" in connection with the sale of all or part of an existing business that was effected through a stock purchase/sale, exchange, merger, or other business combination involving the transfer or issuance of securities if the conditions of the rules are met. Those conditions would include, among others, an annual notice filing or registration with those states having jurisdiction over the intermediary under state securities laws.

As illustrated in the AM&AA's Comparison of Current and Proposed Regulation of Broker-Dealer Activities (Rev. 3/17/07), the Federal and State M&A Broker Rules would require simplified state-level regulation for M&A Brokers whose securities-related activities go beyond the "baseline" recognized by the SEC's historical no-action letters, notably including the recent letter to *Country Business, Inc.*, 2006 SEC No-Act. LEXIS 669 (Nov. 8, 2006). That no-action letter has defined the circumstances when in connection with a small business sale an intermediary is not acting as a "broker" for purposes of the Securities Exchange Act. Proposed Rule 15a-[ ], [*Intermediaries in Small Business Sale Transactions*], would, among other things, codify this no-action letter and aid in the public's understanding of its application. Under the M&A Broker Rules the intermediary could not, however, be involved in capital raising from passive investors. New capital-raising activities in private placements could come within the scope of activities envisioned for a "private placement broker" as has been recommended by, among others, the ABA Private Placement Broker Task Force and the Final Report of the Advisory Committee on Smaller Public Companies dated April 23, 2006, or would otherwise require full broker-dealer registration and regulation under current law.

New investor protections relevant in the context of M&A transactions are built into the proposed Federal and State M&A Broker Rules. For example, the rules require written

engagements between the M&A Broker and its clients and the delivery of written disclosures, including business background information and conflicts of interest. Specific unethical business practices are enumerated in the rules. Most of these standards exist today only as ethical codes of conduct adopted by some of the leading national and regional professional associations, but which do not have the force of law and so do not provide small business sellers and buyers with a full measure of protection because many intermediaries are not members of any professional association and today operate entirely outside of any regulatory oversight or guidance. The non-exclusive list of prohibited practices would be deemed to violate antifraud prohibitions in federal and state securities laws.

The proposed rules are intended to bring clarity to the current application of federal and state securities laws and rules to these activities. Currently, in the context of small business M&A transactions, securities laws and rules are widely ignored by thousands of intermediaries, accounting firms, legal counsel, and the public because their application in this context is so poorly understood, largely irrelevant, and extraordinarily burdensome in relation to the economics of the underlying activities and transactions. The perception of investor protection for small business sellers and buyers under today's regulatory system is illusory—at best it provides an expensive, time-consuming, after-the-fact remedy to redress egregious cases. Small business owners cannot afford the transaction fees that are necessary to support compliance with today's regulatory system, so either go without professional assistance or must use intermediaries who are not compliant. This proposal is intended to proactively address that reality and, as importantly, assure law-abiding intermediaries that their conduct is appropriate.

The related Model Rule [\_\_\_], [*Intermediaries in Small Business Sale Transactions*] addresses facts and circumstances under which an intermediary or business broker has historically been excluded from registration as a broker under the Securities Exchange Act. In a no-action letter issued by the SEC's staff to *Country Business, Inc.*, 2006 SEC No-Act. LEXIS 669 (Nov. 8, 2006), the staff addressed scenarios where the transfer of ownership of a small business begins as an asset sale, generally not subject to the jurisdiction of securities laws, but later changes to the sale or exchange of stock or other securities to convey ownership.

Finally, for the reasons more fully articulated by the American Bar Association's Private Placement Broker-Dealer Task Force,<sup>3</sup> we recommend that, for a reasonable period of time after rulemaking, the state registration process should not focus on prior unregistered activities by requiring affirmative representations or attestations about historical activities—sometimes called “come clean” letters. A number of states do not presently impose such registration-related requirements but others insist upon it. No public purpose is advanced by imposing an industry-wide burden of analyzing thousands of historical transactions under federal and state securities laws in order to represent that there have been no prior unlawful unregistered activities. It is important to emphasize that, apart from registration issues, any prior acts of misconduct punishable under antifraud prohibitions would not be excused. If the SEC or a state regulator later learns of

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<sup>3</sup> Part II, Section V, *Encouraging Registration*, Report and Recommendations of the Task Force on Private Placement Broker-Dealers, 60 Business Lawyer 959 (May 2005).

improper conduct by reason of complaint or inspection, the full range of regulatory powers is available to investigate and address those compliance issues.

### **Authority of State Securities Administrators**

The State M&A Broker Rule would be adopted pursuant to the authority granted to the securities administrator under each state securities act. Such statutory authority is contained in both the Uniform Securities Act of 1956 (“**1956 Uniform Act**”) and the Uniform Securities Act of 2002 (“**2002 Uniform Act**”) (or, generally, the “**Uniform Act**”).

#### **1956 Uniform Act**

Section 412, *Rules, Forms, Orders, and Hearings*, of the 1956 Uniform Act authorizes the securities administrator to, among other things, make rules and forms as are necessary to carry out the provisions of the Uniform Act. The administrator may define terms, whether or not used in the Uniform Act insofar as the definitions are not inconsistent with the provisions of the Act. For the purpose of adopting rules and forms, the administrator may classify securities, persons, and matters within his jurisdiction and prescribe different requirements for different classes.

The administrator must find that the rules and forms are necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of the Uniform Act. In prescribing rules and forms the administrator may cooperate with the securities administrators of the other states and the SEC with a view to effectuating the policy of this statute to achieve maximum uniformity in the form and content of registration statements, applications, and reports wherever practicable.

#### **2002 Uniform Act**

Section 605, *Rules, Forms, Orders, Interpretative Opinions, and Hearings*, of the 2002 Uniform Act authorizes the securities administrator issue forms and, after notice and comment, may adopt and amend rules necessary or appropriate to carry out the Uniform Act. The administrator may by rule define terms, whether or not used in the Uniform Act, but those definitions may not be inconsistent with the Act. By rule the administrator may classify securities, persons, and transactions and adopt different requirements for different classes.

A rule or form may not be adopted unless the administrator finds that the rule or form is necessary or appropriate in the public interest or for the protection of investors and is consistent with the purposes intended by the Uniform Act. In adopting rules and forms, Section 608, *Uniformity and Cooperation with Other Agencies*, of the Uniform Act applies in order to achieve uniformity among the states and coordination with federal laws in the form and content of applications and other records, including the adoption of uniform rules, forms, and procedures. The statutory directive is to effectuate greater uniformity in securities matters among the federal government, self-regulatory organizations, states, and foreign governments. In cooperat-

ing, coordinating, consulting, and sharing records and information, and in acting under the Uniform Act, the administrator shall, in its discretion, take into consideration in carrying out the public interest the following general policies: (1) maximizing effectiveness of regulation for the protection of investors; (2) maximizing uniformity in federal and state regulatory standards; and (3) minimizing burdens on the business of capital formation, without adversely affecting essentials of investor protection.

The 2002 Uniform Act specifies that the subjects for cooperation, coordination, consultation, and sharing of records and information includes, among other things: (1) establishing or employing one or more designees as a central depository for registration and notice filings under the Act and for records required or allowed to be maintained under this Act; (2) developing and maintaining uniform forms; and (3) coordinating registrations of broker-dealers, investment advisers, and their representatives under Sections 401 through 404; (4) formulating rules, statements of policy, guidelines, forms, and interpretative opinions and releases; (5) formulating common systems and procedures; (6) notifying the public of proposed rules, forms, statements of policy, and guidelines; (7) attending conferences and other meetings among securities regulators, which may include representatives of governmental and private sector organizations involved in capital formation, deemed necessary or appropriate to promote or achieve uniformity; and (8) taking other steps to reduce the burden of raising investment capital by small businesses.

In order to create a more uniform system of securities regulation, in Section 15(h) of the Securities Exchange Act Congress preempted the states from imposing requirements for brokers-dealers that differ from, or are in addition to, the requirements in specified areas. Section 15(h) provides that:

No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to, the requirements in those areas established under this title. The Commission shall consult periodically the securities commissions (or any agency or office performing like functions) of the States concerning the adequacy of such requirements as established under this title.

(Emphasis added). In order to best assure uniformity, consistency, and efficiency in the application and administration of the proposed rules, each of these areas is addressed in the proposed *Federal M&A Broker Rule*. The Commission's consultation and coordination with the states is critical to developing and adopting these federal and state rules because the proposed system of regulation depends upon federal and state cooperation.

Many times a business owner needs guidance in organizing the business's affairs in preparation for sale. Sometimes the owner needs assistance in valuing the business to help

determine an appropriate asking price. The permissible activities of an M&A Broker include giving advice about the value of the business for which compensation may be paid. In some cases, compensation for those advisory services is not specifically tied to the consummation of a sale of the business, or a sale may occur at a later point in time. The intent of the proposed rules is to allow an M&A Broker to perform these kinds of advisory services without having to separately register with the administrator as an “investment adviser.” The statutory definition of an “investment adviser” in several states includes an exception for a broker-dealer who is already registered as such with the administrator. If that statutory exception is available and can be applied to an M&A Broker’s registration under this model rule, then references in this model rule to an exemption from investment adviser registration may be unnecessary in particular states.

Many concepts and significant parts of the language used in the proposed rules were derived from existing federal and state securities laws and rules regulating both broker-dealers and investment advisers because an M&A Broker’s engagements typically reflect a blend of those activities. For example, many disclosure concepts come from federal and state rules regulating investment advisers. The definition of a “Legal or Disciplinary Event” and related disclosures of disciplinary events was adapted from the SEC’s Rule 206(4)-4, *Financial and Disciplinary Information that Investment Advisers Must Disclose to Clients*. The definition of a “Regulatory Disqualification” pulls terminology used in SEC rules and adds state law disqualifications. Many of the listed unethical business practices were adapted from existing state law concepts involving securities and real estate transactions. As a result, we believe the resulting rule proposals would better serve and protect small business sellers and buyers by focusing existing laws and rules in a uniform way that everyone can understand and apply in practice. The proposals also cost-effectively scale regulatory requirements recognizing that a substantial number of transactions handled *M&A Brokers* never involve securities.

For ease of understanding the model rule proposal, and to be consistent with the proposed Federal M&A Broker Rule, terms defined in this model rule appear in italics. Otherwise, terms have the meanings assigned under the Uniform Act and the securities administrator’s rules. Italicized text appearing in brackets are the headings of other subsections in the rule, which are provided as an aid to understanding the cross-references.

## **Model State Rule [ ] — Registration of M&A Brokers**

**Preliminary Note:** Since the U.S. Supreme Court’s opinion in *Landreth Timber Co. v. Landreth*, 471 U.S. 681; 105 S. Ct. 2297 (May 28, 1985), the federal securities laws have been applied to the sale of stock of a company. When an intermediary is engaged in the business of effecting the sale of businesses through the sale of stock or otherwise involving securities transactions, the intermediary may come within the definition of a “broker” under the Securities Exchange Act of 1934, as amended (“*Securities Exchange Act*”). As such, a substantial body of laws and related regulations, as well as self-regulatory organization rules, have historically applied to the intermediary and have required, among other things, registration with the Securities and Exchange Commission (“*SEC*”) and membership in a self-regulatory organization. State securities laws apply similar requirements. This rule applies the applicable state securities laws

in a manner which balances the public interest in investor protection with the public interest in assuring that small business sellers and buyers have affordable access to the services of a professional intermediary to assist them with the sale or purchase of a business.

(a) *M&A Broker Registration*. This rule is intended to complement Rule 15a-[ ], *Limited Exemption of Certain “M&A Brokers”* (the “**Federal M&A Broker Rule**”) adopted by the SEC under Section 15 of the Securities Exchange Act. In lieu of registration with the administrator as a “broker-dealer” under Section [X] of the Uniform Act, or as an “investment adviser” under Section [X] of the Uniform Act, a person may register as an *M&A Broker* under this rule if all of the conditions in paragraph (b) [*Conditions to Registration*] are met.

(b) *Conditions to Registration*. In order to qualify for registration under paragraph (a) [*M&A Broker Registration*] of this rule, each of the following conditions must be met with respect to a *Qualified M&A Transaction*:

(1) The activities of the *M&A Broker* and its *associated persons* are performed with respect to a *Qualified M&A Transaction* in the manner described in paragraph (c) [*Nature of Engagement*] of this rule. The *M&A Broker’s* compliance with the conditions of paragraph (c) [*Nature of Engagement*] shall not be affected by any action independently taken by a *party*, such as changing the legal structure of the transaction in a manner that no longer meets the conditions of a *Qualified M&A Transaction* or involving new *parties* in the transaction.

(2) The *M&A Broker* provides its client with an *Engagement* described in paragraph (d) [*Terms and Conditions of the Engagement*] of this rule prior to any obligation of the client to the *M&A Broker* becoming legally binding on the client and prior to the receipt, directly or indirectly, of any money or other consideration from the client by the *M&A Broker* or any *associated person*. The *Engagement* may be subsequently supplemented, amended, or modified as expressly provided in the contract or as otherwise agreed to by the *M&A Broker* and the client. If permitted under applicable state law,<sup>4</sup> the *Engagement* may expressly provide that the *M&A Broker*, through one or more of its *associated persons*, is acting on behalf of one or more of the *parties* as an independent, dual, or limited intermediary, and not as an agent for a single principal in the *Qualified M&A Transaction* (a “*Modified Agency Capacity*”). The *Engagement* shall describe the role of the *M&A Broker* and its *associated persons* in a *Modified Agency Capacity*, their legal obligations to the *parties* to the transaction, if any, and any limitations on those obligations as may be imposed contractually or under applicable state law.

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<sup>4</sup> We have incorporated the concept of a *Modified Agency Capacity* to harmonize this rule with other state licensing laws. Real estate licensing laws in several states recognize and authorize modified agency relationships, including relationships referred to as “dual agency,” “transaction broker,” and “designated sales associate.” Such state licensing laws impose their own obligations and requirements with respect to these kinds of agency relationships. Adding this *Modified Agency Capacity* concept to the rule is not intended to itself create agency relationships that are not otherwise recognized by state laws.

(3) The *M&A Broker* delivers the written *Background and Conflict Disclosures* described in paragraph (e) [*Background and Conflict Disclosures*] of this rule to its client(s) before the *Engagement* becomes legally binding on the client. If the *M&A Broker* is acting in a *Modified Agency Capacity*, the *M&A Broker* delivers the *Background and Conflict Disclosures* to all known *parties* to the *Qualified M&A Transaction* not later than the time when those *parties* enter into a legally binding contract to consummate a *Qualified M&A Transaction*.

(4) The *M&A Broker* makes each required *Regulatory Filing* described in paragraphs (f) [*Home State Registration*] and (g) [*Notice Filing in Other States*] of this rule.

(5) Each *associated person* of the *M&A Broker* involved in the *Qualified M&A Transaction* meets all qualifications and requirements imposed under the *M&A Broker's home state(s)* securities laws and related rules.

(6) The *M&A Broker* makes and maintains the books and records required by the *Federal M&A Broker Rule*, or any successor rule, promulgated by the SEC under Section 15 of the *Securities Exchange Act*.

(7) The *M&A Broker* meets the financial responsibility requirements of the *Federal M&A Broker Rule*, or any successor rule, promulgated by the SEC under Section 15 of the *Securities Exchange Act*.

(8) With respect to the *Qualified M&A Transaction*, neither the *M&A Broker* nor any *associated person* of the *M&A Broker* has engaged in any prohibited or unethical business practice described in paragraphs (j) [*Prohibited Activities*] or (j) [*Unethical Business Practices*] of this rule.

(9) Neither the *M&A Broker* nor any *associated person* of the *M&A Broker* is subject to a *Regulatory Disqualification* as defined in paragraph (l) [*Definitions*] of this rule. With respect to any state law disqualifications imposed under this Uniform Act, the administrator may waive that disqualification, with or without imposing conditions on the individual's participation in *Qualified M&A Transactions*, upon a satisfactory showing of good cause to grant such a waiver; provided, that such waiver is consistent with the public interest and the protection of investors.

(c) Nature of Engagement. The registration permitted under paragraph (a) [*M&A Broker Registration*] of this rule is available only with respect to activities that are related to a proposed or actual transaction, whether or not consummated, involving securities that meets all of the following conditions (a "***Qualified M&A Transaction***"):

(1) The *M&A Broker's* services described in the *Engagement* pertain to the purchase or sale of a *Business*, regardless of the existing or resulting form of ownership

or the legal structure used in the transaction to convey the ownership of the *Business* (e.g., sale of assets, exchange of securities, merger, or other business combination).

(2) One or more *Eligible Buyers* purchase, directly or indirectly, ownership of the *Business*.

(3) Ownership of the *Business* is not represented by any class of securities that is registered, or is required to be registered, with the SEC under Section 12(g) of the *Securities Exchange Act* or with respect to which the issuer files periodic information, documents, and reports under Section 15(d) of the *Securities Exchange Act*.<sup>5</sup>

(4) Only the *Business* is advertised or marketed for sale and not its securities. Advertising of the *Business* may use any form of public media including, for example, mailings, newspapers, magazines, and the Internet.

(5) Neither the *Business* nor the client is known by the *M&A Broker* to be a “public shell company” (i.e., any company whose securities are publicly traded on an exchange or over the counter but which no longer has any significant business operations) or any legal entity formed for the purpose of evading the registration or exemption requirements of the Securities Act of 1933, as amended, the *Securities Exchange Act*, or the SEC’s related rules.

(6) In determining the *M&A Broker’s* compliance with the conditions of this paragraph, the *M&A Broker* may rely upon representations made by a *party* in the *Engagement*, in any transaction-related document exchanged by the *parties*, or in any separate document signed by the *party* making the representations. The *M&A Broker* will not be deemed to have failed to meet a conditions of paragraph (c) [*Nature of Engagement*] of this rule to the extent that a *party* refuses to provide the *M&A Broker* with any representation or documentation described in this rule. If for reasons beyond the control of the *M&A Broker* the conditions of this paragraph are no longer met with respect to an *Engagement*, the *M&A Broker’s* role from that point forward shall be limited to the following:

- (i) transmitting documents between the *parties*;
- (ii) valuing the assets of the *Business*;
- (iii) providing administrative support; and
- (iv) assisting the client with preparation of financial statements.

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<sup>5</sup> This would not preclude a *Business* from being acquired by a company whose securities are registered with the SEC under Section 12(g) of the *Securities Exchange Act* or with respect to which the issuer files periodic information, documents, and reports under Section 15(d) of the *Securities Exchange Act* where, for example, the consideration given to the seller are the buyer’s securities.

(d) Terms and Conditions of the Engagement. The *M&A Broker* shall provide the client with a written “**Engagement**” containing, at a minimum, the following information:

(1) A description of the *M&A Broker’s* services and any related deliverables that are material to those services.

(2) All of the material terms, conditions, and contingencies pertaining to the *M&A Broker’s* services and any related deliverables in connection with the *Qualified M&A Transaction*.

(3) The name(s) of the *party* or other payor, and the amount or manner of calculation, of all advances, deposits, fees, charges, compensation, and expense reimbursements to be paid to the *M&A Broker*, directly or indirectly, fixed or contingent, in connection with the *Qualified M&A Transaction*. The *M&A Broker’s* compensation may be a fixed amount or a percentage of the transaction’s value, or may be related to the post-closing performance of the *Business*, and may be contingent upon a successful consummation of the transaction regardless of the transaction’s structure (i.e., whether structured as a transfer of assets or securities). The *M&A Broker’s* compensation may include securities (e.g., stock, options, or warrants), subject to all applicable requirements under federal and state securities laws.<sup>6</sup>

(4) If the *M&A Broker* is acting in a *Modified Agency Capacity* as described in paragraph (e)(12), the consent of each *party* to the *M&A Broker’s* role in the transaction as disclosed in the *Engagement* or the *Background and Conflict Disclosures*.

(5) A provision stating that there cannot be an assignment of the *Engagement* by the *M&A Broker* without the prior consent of the client. A transaction which does not result in a change of actual control or management of the *M&A Broker* is not an “assignment” for purposes of this paragraph.

(6) If the *M&A Broker* is legally organized as a partnership, a provision stating that the client will be promptly notified of any material change in the membership of the partnership.

(e) Background and Conflict Disclosures. The “**Background and Conflict Disclosures**” required by paragraph (b) [*Conditions to Registration*] of this rule contain, at a minimum, the following information and may contain additional information so long as the required content remains conspicuous. The disclosures may be delivered in paper or in electronic formats so long as a client is able to retain a copy. The required content includes:

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<sup>6</sup> Securities received by an *M&A Broker* as compensation could be registered stock or could be restricted stock depending on the relevant facts and circumstances, so the rule does not attempt to characterize what restrictions or limitations may apply under applicable securities laws and rules.

(1) The legal and any assumed names of the *M&A Broker*, its state of organization or domicile, its primary business address, its primary telephone number, its website (if any), and the name of a person who can be contacted for further information.

(2) Background information about the *M&A Broker*, including how long it has been in business, the names of its directors, principal officers, managers, or partners, and the name of any affiliated business that may become involved, directly or indirectly, in the *Qualified M&A Transaction*.

(3) A general description of the *M&A Broker's* primary and any related ancillary business services.

(4) The name of each *associated person* of the *M&A Broker* who will have primary responsibility for performing the services described in the *Engagement* and describing the person's education; business background and employment for at least the prior five years; professional credentials and designations; and all current regulatory registrations, licenses, examinations, and other qualifications.

(5) A description of all known and reasonably anticipated roles, relationships, direct or indirect compensation, economic interests, referral relationships, and other conflicts of interest that the *M&A Broker* or its *associated persons* may have with respect to the *M&A Broker's* client or any other person involved with the *Qualified M&A Transaction*.

(6) A description of any control or ownership relationships, directly or indirectly, between or among the *M&A Broker* and any of the *parties*, lenders, or service providers to the *Qualified M&A Transaction*.

(7) A description of any *Legal or Disciplinary Event* that resulted in a penalty, sanction, judgment, or award against the *M&A Broker* or a *management person* of the *M&A Broker* during the prior 10 years that is material to an evaluation of the integrity of the *M&A Broker* or a *management person*, or the *M&A Broker's* ability to perform the *Engagement*, including the date and nature of the action, the agency, court, or arbitration forum, and the result and/or sanction imposed.

(8) A statement that the *M&A Broker* is "relying upon a federal exemption from broker registration under the Securities Exchange Act of 1934 with the United States Securities and Exchange Commission" and providing the Commission's current headquarters address, telephone number, and Internet website address.

(9) A statement that the *M&A Broker* is "subject to the securities laws and related rules in the state or states where it is headquartered or has an office, and may be subject to other state securities laws and rules;" and the name, address, telephone number,

and Internet website address of the state securities agency in each state where it is headquartered or has an office.

(10) The *M&A Broker* may identify itself in the disclosure document, and may hold itself out to the public, as being a “state registered M&A broker” or a “state registered M&A advisor” if it complies with the requirements of this rule.

(11) Cautionary statements to the effect that:

(i) The client is encouraged to seek legal counsel before advancing any money, disclosing any nonpublic documents, or entering into any legally binding contracts or agreements, either oral or written, such as the *Engagement*, a confidentiality agreement, a letter of intent, or an agreement to buy or sell some or all of a business, its ownership, or its assets.

(ii) The *M&A Broker* may or may not, as applicable, have independently verified some or all of the information provided by one *party* to any other *party* to the transaction.

(iii) The *M&A Broker* is not a member of a self-regulatory organization such as the Financial Industry Regulatory Authority (f/k/a National Association of Securities Dealers, Inc.).

(iv) The disclosures have not been reviewed or approved by the SEC or any state securities agency or self-regulatory authority.

(v) Registration of the *M&A Broker* or its *associated persons* under applicable state securities law requirements does not, in and of itself, imply that the *M&A Broker* possesses any specified level of skill, training, or experience, except as may be prescribed by state law or related rules.

(12) If permitted under applicable state law and expressly provided in the *Engagement*, the *M&A Broker* is acting in the *Qualified M&A Transaction* in a *Modified Agency Capacity*, then statements that:

(i) Neither the *M&A Broker* nor any of its *associated persons* considers any single *party* to the transaction to be its “principal” under state agency law. The *M&A Broker* and its *associated persons* will treat each of the *parties* to the transaction fairly and equitably, and will not favor one *party*’s interests over another.

(ii) The *Engagement* contains all of the material terms and conditions related to the *M&A Broker*’s role in the transaction with respect to the *parties*.

(iii) All compensation to be received, directly or indirectly, by the *M&A Broker* and its *associated persons* in connection with the transaction has been fully disclosed to all *parties*.

(iv) The *parties* are encouraged to consult with their own legal counsel or independent financial advisors with respect to the *Engagement* and the transaction.

(v) Are specifically prescribed by applicable state law.

(13) The most current effective or revision date of the disclosures.

(f) Home State Registration. In order to register under paragraph (a) [*M&A Broker Registration*] of this rule, an *M&A Broker* shall make a “**Regulatory Filing**” with the administrator in each state or states in which its home office and any branch office are located or in which it regularly and systematically conducts business involving securities that is subject to this rule (its “**home state(s)**”). The *Regulatory Filing* shall be made annually. The *Regulatory Filing* shall be made and consist of all of the following:

(1) The legal and any assumed names of the *M&A Broker*, its state of organization or domicile, its primary business address, its primary telephone number, its website (if any), and the name of a person who can be contacted for further information.

(2) A balance sheet reporting the *M&A Broker’s* assets, liabilities, and ownership equity, demonstrating that the *M&A Broker* is solvent. The balance sheet shall be —

(i) dated as of a date not less than 45 days prior to the date of the filing with the *M&A Broker’s home state(s)*;

(ii) certified by the *M&A Broker’s* chief executive officer as being true and accurate in all material respects.

(iii) prepared or compiled by an independent public accountant; provided, if the *M&A Broker* requires from a client an advance, deposit, retainer, or prepayment of fees or reimbursable expenses of more than \$50,000 more than six months in advance of earning some or all of the fees or incurring the reimbursable expenses determined in the manner prescribed in the *Engagement*, then it shall be either reviewed or audited by an independent public accountant.

(3) With respect to each *associated person* of the *M&A Broker* —

(i) his or her name and any known assumed names or aliases;

(ii) his or her ownership interest, if any, in the *M&A Broker*;

(iii) his or her current residential address, date of birth, social security number, and starting date with the *M&A Broker*; and

(iv) any individual identification number(s) issued by or on behalf of a registered securities exchange, a registered securities association, or a state regulatory agency.

(4) With respect to the *M&A Broker* and all *associated persons* of the *M&A Broker*, a signed certification by the *M&A Broker's* chief executive officer that, to the best of his or her knowledge after reasonable inquiry —

(i) no *associated person* is subject to a *Regulatory Disqualification*; and

(ii) no *associated person* has been subject to a *Legal or Disciplinary Event*, except as described in the *Regulatory Filing*.

(5) A copy of the *M&A Broker's* current *Background and Conflict Disclosures* and generic samples of the customary form or forms typically used in its *Engagements*.

(6) Payment of the fee or fees applicable to the *Regulatory Filing* prescribed by the administrator.

(g) *Notice Filings in Other States*. With respect to any state, other than its *home state(s)*, having jurisdiction with respect to the *M&A Broker* or a *Qualified M&A Transaction*, the *M&A Broker* shall make a “***Notice Filing***” with the administrator at the earlier to occur of (i) entering into an *Engagement* with a client located in that state or (ii) the closing of a transaction in, or involving a *party* located in, that state or as soon thereafter as the *M&A Broker* is notified that the closing has occurred. For purposes of complying with this rule, no Notice Filing shall be required in any state that has not adopted under its securities law a rule implementing the state-level requirements of this rule. The *Notice Filing* shall, if necessary, be made annually. The *Notice Filing* shall be made and consist of all of the following:

(1) A duplicate copy of the *Regulatory Filing* made with its *home state(s)*, which shall be filed with the administrator not less than five business days prior to the closing of the transaction.

(2) The balance sheet filed with the *M&A Broker's home state(s)* certified by the *M&A Broker's* chief executive officer as then continuing to represent the financial condition of the *M&A Broker* in all material respects. If there has been a material adverse change in the *M&A Broker's* financial condition since the original date of the balance sheet, then the *M&A Broker* shall file a new balance sheet as of a date not less than

45 days prior to the filing, certified by the *M&A Broker's* chief executive officer as being true and accurate in all material respects.

(3) Payment of the fee or fees applicable to the *Notice Filing* prescribed by the administrator.

(h) Books and Records. An *M&A Broker* shall make and maintain the following books and records, which shall be preserved and made available promptly upon request for inspection by the SEC's staff and state regulatory agencies having jurisdiction over the *M&A Broker* for not less than six years, the first two years in an easily accessible place:

(1) Each version of the *Background and Conflict Disclosures*, including all amendments and supplements, as delivered to a client or *party* to a transaction.

(2) A list of all *Engagements*, including the names and addresses of the *parties* and the date of each transaction's closing.

(3) The *Engagement* and the *Background and Conflict Disclosures*, including all related amendments and supplements, delivered to each client of the *M&A Broker*.

(4) The following records with respect each *Qualified M&A Transaction* (to the extent that these documents are provided to the *M&A Broker* by a *party*):

(i) All legally binding agreements, including amendments and supplements, among the *parties* to the transaction.

(ii) The principal closing documents, including documents used to convey title and ownership of the *Business* and evidencing the transmittal or delivery of the consideration exchanged by the *parties*.

(iii) Evidence demonstrating that the transaction meets the conditions of paragraph (b) [*Conditions to Registration*] of this rule.

(iv) Records of the receipt, directly or indirectly, of all compensation by the *M&A Broker* and its *associated persons* with respect to the transaction.

(5) Each of the *M&A Broker's* check books, account statements, and reconciliations with respect to each bank, brokerage, mutual fund, or other custodial account used in connection with its securities-related business activities.

(6) A compliance manual describing the requirements and prohibitions of this rule and those aspects of federal and state securities laws and related rules that are applicable to the *M&A Broker's* activities, and including a statement of policies and proce-

dures reasonably designed to assure compliance with those requirements by the *M&A Broker* and its *associated persons*.

(7) An application or questionnaire for employment (such as a FINRA Form U-4) executed by each *associated person* of the *M&A Broker*, reviewed and approved in writing by its authorized representative, and containing at least the following information with respect to the *associated person*:

(i) The *associated person's* name, any assumed names or aliases, current and last residential address, date of birth, social security number, and the starting date of the *associated person's* employment or other association with the *M&A Broker*.

(ii) A complete, consecutive statement of all the *associated person's* employment for at least the preceding ten years, noting whether such employment was part time or full time.

(iii) A list of all registrations, qualifications, and licenses held with any registered securities exchange, registered securities association, or state regulatory agency under securities or insurance laws during the preceding ten years, including the individual's identification number issued by or on behalf of the association or agency (such as the FINRA's Central Registration Depository).

(iv) A certification that the *associated person* is not subject to any *Regulatory Disqualification*, except as specifically described in the certification with related documentation attached.

(v) A certification that the *associated person* has not been subject to a *Legal or Disciplinary Event*, except as specifically described in the certification with related documentation attached.

(8) Any deliverable document from the *M&A Broker* to a client that is specifically identified in the *Engagement* (such as a business appraisal).

(9) A file containing all written complaints from clients or *parties* to a *Qualified M&A Transaction* objecting to the conduct, activities, or services performed by the *M&A Broker* or its *associated persons*.

(i) Permitted Activities. Insofar as compliance with the Uniform Act is concerned,<sup>7</sup> if the conditions to this rule are met, an *M&A Broker* and its *associated persons* may engage in

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<sup>7</sup> Other federal, state, and local laws, rules, and ordinances may also apply, such as professional licensing for the practice of law or accountancy. This exemption does not alter or affect registration, licensing, or other requirements applicable to other types of businesses or transactions under other federal or state laws such as may be applicable to a business broker, real estate broker, mortgage broker/lender/servicer, bank, or insurance producer or agency.

any activities not prohibited by this rule or other applicable laws, rules, or regulations<sup>8</sup> with respect to a *Qualified M&A Transaction* without being registered with the administrator as a “broker-dealer” or as an “investment adviser” under the Uniform Act, including, without limitation:

(1) Advise a client about the value of the *Business*, the price, the terms, the legal structure for the transaction, tax implications, and other transaction-related matters; and advise a client about one or more purchase offers, including the terms, amount and form of consideration, and all other aspects of the proposal.

(2) Prepare, or help prepare, and communicate with *parties* to the transaction, an information package or other documents with respect to the *Business* containing some or all of the following without limitation: business description, its history, historical financial statements, pro forma financials, current ownership structure, organization, management, owners’ and management’s objectives with respect to on-going involvement, seller’s motivation, willingness of the seller to finance, preferred transaction structure, forecast, what is included/excluded in the sale, price expectations, and valuation of the *Business*.

(3) In a “sell-side” *Engagement*, identify prospective *Eligible Buyers* and advertise and market the sale of a *Business* to *Eligible Buyers*, other intermediaries, professional advisors (e.g., lawyers, accountants, and bankers), using private and public media such as mailings, newspapers, magazines, and the Internet; provided, that the *M&A Broker* screens inquiries and only proceeds with those persons who are reasonably believed to be *Eligible Buyers* or their authorized representatives.

(4) In “buy-side” *Engagements*, identify and communicate with prospective sellers to determine their interest in a transaction.

(5) In all *Engagements*, contact and meet with the prospective *parties* to obtain or provide information about the *Business* and the prospective *parties*.

(6) Negotiate the price, terms and conditions, legal structure, and other matters with respect to the transaction with or on behalf of a client.

(7) Draft or participate in drafting, or communicate terms sheets, letters of intent, offers, counteroffers, and definitive purchase agreements or other documents on behalf of its client; provided, however, that, for an *M&A Broker* to engage in these specific activities, legal counsel shall also be involved in closing the transaction unless the aggregate consideration to be exchanged is reasonably believed to be valued at less than \$500,000.

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<sup>8</sup> These permitted activities are provided by way of examples to aid in the common understanding of this rule and its effects in light of existing guidance issued by the SEC and the staff. This list is not exhaustive of permissible activities related to *Qualified M&A Transactions*.

(8) Organize and assist with the preparations or performance of any due diligence investigation with respect to the *Business* or the *parties* to the transaction.

(9) Suggest or recommend sources of possible commercial financing to a buyer; provided, that the *M&A Broker* has no role and does not receive compensation of any kind with respect to a securities offering to finance any part of the transaction.

(10) Conduct or assist with the closing of the transaction, including the delivery of closing documents; provided, that the *M&A Broker* must not have actual or constructive custody, possession, or handle any funds in any form (including such forms as cash, checks, and money orders)<sup>9</sup> or securities exchanged by the *parties* in the transaction.

(11) Analyze, model, or project the revenues, expenses, and financial performance of the *Business*, proposed payment terms and any contingencies, or the proposed structure of the transaction including, for example, evaluating historical and projected revenues and expenses, financial modeling and forecasting, benchmarking with comparable businesses and transactions, appraising the *Business's* assets and liabilities, cash flow analyses, and similar financial matters; provided, that these activities do not include or involve any analysis of the *Business's* stock value or performance in public securities markets.

(12) Prepare financial and analytical reports and models pertaining to the *Business* and its operations; provided, that the *M&A Broker's* work product conspicuously states that it is intended only for internal use by the client or the parties to the transaction and use by their counsel, accountants, bankers, and other professional advisors, and by *Eligible Buyers* in a *Qualified M&A Transaction*.

(13) Prepare or assist with a client's proposal and/or application to obtain a commercial loan from a bank, commercial lender, or financing sources other than involvement with a securities offering to raise debt or equity to finance the transaction.

(14) Receive compensation from referral and fee-sharing arrangements with registered brokers and dealers or other brokers operating under this or any other exemption from registration under the Act, provided that the compensation is fully disclosed as provided in this rule and subject to compliance with all applicable laws and rules, and self-regulatory organization bylaws and rules, pertaining to such referrals and related compensation.<sup>10</sup>

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<sup>9</sup> Current federal law requires a broker-dealer to have a minimum net capital of \$50,000 in order to handle client checks or securities. Annual independently audited financial statements are also required, together with a schedule calculating the firm's net capital.

<sup>10</sup> For example, NASD Rule 2420 presently limits referral fees being paid by members to non-members. This is a rule which historically was based on a concern about the non-member being engaged in an activity for which broker-dealer registration was required. The ability for fully-registered broker-dealers to pay, and state-registered M&A Brokers to receive, referral fees would facilitate the free flow of clients and their transactions among intermediaries, offering different levels of services, skills, professional expertise, and associated fees and costs.

(15) Receive compensation from banks, appraisers, title companies, insurance agencies, and other nonsecurities-related, third-party service providers, provided that the compensation is fully disclosed as provided in this rule and subject to compliance with all applicable laws, rules, or regulations pertaining to referrals in those contexts (e.g., insurance licensing).

(j) Prohibited Activities. An *M&A Broker* and its *associated persons* may not engage in any of the following activities in reliance upon this rule:

(1) Make or participate in any offer or sale of securities other than pursuant to this rule to any person other than (i) an *Eligible Buyer*, (ii) the seller or other person employed in a management capacity with respect to the *Business* who receives restricted securities as transaction-related consideration or for future services, or (iii) the *M&A Broker* or its *associated persons* who receives restricted securities as consideration for their services.

(2) Have actual or constructive custody or possession of funds or securities of a buyer, seller, or other *party* to the *Qualified M&A Transaction*. This shall not prohibit an advance, deposit, retainer, or prepayment of fees or reimbursable expenses; provided, that if the amount is more than \$50,000 and is received more than six months in advance of earning some or all of the fees or incurring the reimbursable expenses determined in the manner prescribed in the *Engagement* those funds shall be deposited until earned by the *M&A Broker* in a segregated account separately identified as being for the benefit of the *M&A Broker's* clients at an insured depository institution.

(3) Exercise discretionary authority to legally bind a buyer, seller, or *party* to any legal obligation, or to close a *Qualified M&A Transaction*. This does not prohibit an *M&A Broker* from having an express written direction and power of attorney to act on behalf of a *party* within the explicit limitations on that authority.

(k) Unethical Business Practices. The following is a non-exclusive list of business practices which are deemed to constitute a violation of Section [X] of the Uniform Act [and the related Rule [X]] by an *M&A Broker* or its *associated persons*.

(1) The *M&A Broker* or an *associated person* shall not, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails —

(i) employ any device, scheme, or artifice to defraud;

(ii) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(iii) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

(2) The *M&A Broker* or an *associated person* fails to fully and accurately disclose to any client or prospective client all material facts with respect to:

(i) any financial condition or circumstance of the *M&A Broker* or an *associated person* that is reasonably likely to impair the *M&A Broker's* ability to meet contractual commitments to clients if the *M&A Broker* requires an advance, deposit, retainer, or prepayment of fees or reimbursable expenses of more than \$50,000 more than six months in advance of earning some or all of the fees or incurring the reimbursable expenses determined in the manner prescribed in the *Engagement*;

(ii) a *Legal or Disciplinary Event* that is material to an evaluation of the integrity of the *M&A Broker's* or any *management person* of the *M&A Broker* or the ability of the *M&A Broker* to perform the *Engagement*; or

(iii) any information required to be disclosed by paragraph (e) [*Background and Conflict Disclosures*] of this rule in its *Background and Conflict Disclosures*.

(3) The *M&A Broker* or an *associated person* fails to —

(i) protect and promote the best interests of its client;

(ii) inform or otherwise ensure disclosure to the client of any material information which the *M&A Broker* or its *associated person* knows, or in the exercise of reasonable care should know based on the information furnished to the *M&A Broker*, is material to the client's decision-making with respect to a transaction; the *M&A Broker* is not required to independently generate nor verify information provided by a client or by another *party*, provided that the *M&A Broker* discloses to all recipients the extent of, or limitations upon, any investigation performed with respect to the information;

(iii) fully disclose all of its conflicts of interests;

(iv) timely deliver all bona fide written offers or counteroffers received by the *M&A Broker* to the client and disclose all known information pertaining to the offer or counteroffer that would be material to the client's decision making with respect to the offer or counteroffer; and timely deliver any written counteroffer as directed by the client; and

- (v) disclose to the client if a “buy-side” *Engagement* is not exclusive and that the *M&A Broker* or an *associated person* may also represent one or more other potential *parties* to a possible transaction with respect to the *Business* and the circumstances under which it may do so.
- (4) The *M&A Broker* or an *associated person* shall not —
- (i) favor its own interests or the interests of any *party* over the client or, if acting in a *Modified Agency Capacity*, favor one *party* over another *party* without full disclosure and authority from each *party*;
- (ii) disclose the client’s confidential information to another person without the client’s authorization;
- (iii) make a loan to the client or to another *party* for the purpose of funding any part of a transaction without fully disclosing the existence of the loan to all *parties*;
- (iv) make an appraisal of the *Business* that is outside or beyond the scope of the *M&A Broker’s* experience without either (A) obtaining the assistance of an authority on such types of property; or (B) disclosing the extent or lack of the *M&A Broker’s* experience to the client;
- (v) make an appraisal or render an opinion of value on any *Business* when the *M&A Broker* has a present or contemplated interest unless such an interest is specifically disclosed in the appraisal; the *M&A Broker’s* employment or fee may not be contingent upon the amount of an appraisal;
- (vi) take any action by or on behalf of a client (A) without having authority from the client to do so in the *Engagement* or otherwise; or (B) that is contrary to the explicit written instructions of the client with respect to that matter;
- (vii) accept any form of compensation from any person other than the client with respect to an *Engagement* without fully disclosing the compensation in writing to the client;
- (viii) misrepresent the person’s educational record, professional background, experience, track record or successes with respect to other transactions, or business relationships with the intent to induce the client to engage the *M&A Broker*; or
- (ix) misrepresent the number or qualifications of the professional or staff employed by, or affiliated or associated with the *M&A Broker*, with the in-

tent to exaggerate the true size, scope, experience, or capabilities of the *M&A Broker*.

(l) Definitions. Italicized terms not otherwise defined in this rule have the following meanings for purposes of this rule:

(1) An “***associated person***” of an *M&A Broker* includes —

(i) any partner, officer, director, manager, or trustee (or any person occupying a similar status or performing similar functions) with respect to the *M&A Broker*;

(ii) any person directly or indirectly controlling, controlled by, or under common control with the *M&A Broker*; and

(iii) any employee, independent contractor, or other authorized representative of such broker, but excepting any person whose functions are solely clerical or ministerial.

(2) A “***Business***” means a business, business unit, business line, division, department, or specific assets held by a sole proprietorship, corporation, limited liability company, partnership, business trust, or other legal entity for use in connection with the operation of a commercial enterprise.

(3) An “***Eligible Buyer***” includes all of the following:

(i) An individual who, besides acquiring an ownership interest in the *Business*, will —

(A) be personally and actively engaged in the governance, management, and operation of the *Business* following a *Qualified M&A Transaction* in the capacity of a corporate director or senior officer, a member or manager of a limited liability company, a general partner of a partnership, a trustee of a business trust, a sole proprietor, or a position of similar involvement with the *Business*;

(B) alone, or acting in concert with others, control the governance, management, and operations of the *Business*; and

(C) have access to substantially all of the *Business*’s financial, accounting, tax, and other books and records.<sup>11</sup>

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<sup>11</sup> An *Eligible Buyer* need not be an “accredited investor.” Some small business buyers would not qualify as such and this rule is intended to benefit them too.

(ii) A member of the immediate family (parent, spouse, sibling, or child) of an individual described in the preceding subparagraph (i).

(iii) A trust the primary beneficiary of which is any individual described in the preceding subparagraphs (i) and (ii).

(iv) An existing business entity (including a sole proprietorship).

(v) An existing venture capital fund, an equity fund, the sponsor of such a fund, a business development company, a small business investment company, or any similar entity.

(vi) A corporate entity or entities formed to facilitate the transaction that is owned and controlled by a person described in the preceding subparagraphs (i), (ii), (iii), (iv), or (v). In determining who is an *Eligible Buyer* one or more related steps taken for a business purpose proximately in time to a *Qualified M&A Transaction's* closing will be viewed as a whole.

(vii) An employee stock ownership plan as defined in Section 4975(e)(7) of the Internal Revenue Code of 1986, as amended, for the benefit of some or all of the employees of the *Business*.

(4) “**Legal or Disciplinary Event**” means any of the following events involving the *M&A Broker*, a *management person*, or an *associated person* that was not resolved in the person’s favor, or were not subsequently reversed, suspended, vacated, or expunged:

(i) A criminal or civil action in a court of competent jurisdiction or an arbitration forum in which the person —

(A) was convicted, pleaded guilty or nolo contendere (“no contest”) to a felony or misdemeanor, or is the named subject of a pending criminal proceeding involving an *investment-related* business; fraud, false statements, or omissions; wrongful taking of property; or bribery, forgery, counterfeiting, or extortion;

(B) was *found* to have been *involved* in a violation of an *investment-related* statute or regulation; or

(C) was the subject of any order, judgment, or decree permanently or temporarily enjoining the person from, or otherwise limiting the person from, engaging in any *investment-related* activity or being associated with any broker-dealer, investment adviser, bank, or other financial institution.

(ii) Administrative proceedings before the SEC or any other federal regulatory agency or any state regulatory agency in which the person —

(A) was *found* to have caused an *investment-related* business to lose its authorization to do business; or

(B) was *found* to have been *involved* in a violation of an *investment-related* statute or regulation and was the subject of an order by the agency denying, suspending, or revoking the authorization of the person to act in, or barring or suspending the person's association with, an *investment-related* business; or otherwise significantly limiting the person's *investment-related* activities.

(iii) Proceedings by a *SRO* in which the person —

(A) was *found* to have caused an *investment-related* business to lose its authorization to do business; or

(B) was *found* to have been *involved* in a violation of the *SRO's* rules and was the subject of an order by the *SRO* barring or suspending the person from membership or from association with other members, or expelling the person from membership; fining the person more than \$2,500; or otherwise significantly limiting the person's *investment-related* activities.

(iv) Disciplinary proceedings by any professional association, educational institution, or other organization suspending or revoking a professional credential, designation, attainment, or license to use its professional trademarks.

(5) When used in this rule in the context of a *Legal or Disciplinary Event* —

(i) a “*management person*” means a person with power to exercise, directly or indirectly, a controlling influence over the management or policies of the *M&A Broker* or to determine the advice or recommendations given to a client;

(ii) “*found*” means determined or ascertained by adjudication, award, or consent in a final *SRO* proceeding, administrative proceeding, or court action;

(iii) “*investment-related*” means pertaining to securities, commodities, banking, insurance, or real estate (including, but not limited to, acting as or being associated with a broker-dealer, investment company, investment adviser, government securities broker or dealer, municipal securities dealer, bank, savings and loan association, entity or person required to be registered under the Act, Invest-

ment Advisers Act of 1940, as amended (“*Advisers Act*”), or the Commodity Exchange Act [7 U.S.C. § 1, et seq.], or fiduciary); and

(iv) “*involved*” means acting or aiding, abetting, causing, counseling, commanding, inducing, conspiring with, or failing reasonably to supervise another in doing an act.

(6) An “*M&A Broker*” is a person (either corporate or natural) who is acting as a “broker-dealer” as defined in the Uniform Act in connection with the sale of all or part of an existing *Business*, including stock purchases, exchanges, mergers, acquisitions, and business combinations involving the transfer or issuance of securities in a *Qualified M&A Transaction*. The term does not include a person who is acting as an intermediary or business broker in connection with a transaction described in Model State Rule [\_\_\_], [*Intermediaries in Small Business Sale Transactions*].

(7) A “*party*” or “*parties*” to a *Qualified M&A Transaction* is the person or persons who are signatories to the Engagement or are identified as signatories to a definitive agreement to consummate the transaction as a buyer or seller and who are specifically identified as such to the *M&A Broker*.

(8) A “*Regulatory Disqualification*” means the person is or was —

(i) subject to a SEC order issued under Section 15(b)(4) of the *Securities Exchange Act*;

(ii) subject to a SEC order issued under Section 203(f) of the *Advisers Act*;

(iii) convicted within the previous ten years of any felony or misdemeanor involving conduct described in Section 203(e)(2)(A) through (D) of the *Advisers Act*;

(iv) found by the SEC to have engaged, or has been convicted of engaging, in any of the conduct specified in paragraphs (1), (5), or (6) of Section 203(e) of the *Advisers Act*;

(v) subject to an order, judgment, or decree described in Section 203(e)(4) of the *Advisers Act*; or

(vi) subject to an order issued by the administrator under this Uniform Act, by an administrator under another state’s securities laws, or by a SRO under its bylaws or rules, to—

(A) revoke or suspend the registration or membership of the person as a broker-dealer, agent, investment adviser, investment adviser representative; or

(B) bar the person from association with a broker-dealer or investment adviser as a partner, officer, director, agent, representative or person having a similar status or performing similar functions with a broker-dealer or investment adviser, or from directly or indirectly controlling a broker-dealer or investment adviser.

(9) A “***Self-Regulatory Organization***” or “***SRO***” means any national securities or commodities exchange, registered association, or registered clearing agency.

### **Model State Rule — Intermediaries in Small Business Sale Transactions**

**Preliminary Note:** This rule codifies historical guidance provided by the staff of the Securities and Exchange Commission (“SEC”) in the no-action letter to *Country Business, Inc.*, 2006 SEC No-Act. LEXIS 669 (Nov. 8, 2006). This no-action letter addressed the role of an intermediary where the transfer of ownership of a small business begins as an asset sale, generally not subject to the jurisdiction of securities laws, but later changes into the sale or exchange of stock or other securities to convey ownership. Upon such a change in the legal structure of the transaction, an intermediary who limits its activities with respect to transactions described in this rule is exempt from the definition of a “broker” under the Securities Exchange Act of 1934, as amended (“*Securities Exchange Act*”). An intermediary whose activities fit within these facts and circumstances is not subject to registration as a broker under the *Securities Exchange Act*, registration and regulation an “M&A Broker” under the *Federal M&A Broker Rule*, SEC Rule [\_\_\_\_], or a “Private Placement Broker” under the *Federal PPB Rule*, SEC Rule [\_\_\_\_]. To harmonize the application of federal and state securities laws, the same exclusion is created by this rule with respect to the *Uniform Act*.

This exclusion from broker-dealer registration and related regulation does not affect the application of the antifraud provisions of state securities laws to securities-related activities.

**Exemption From Definition of a “Broker-Dealer.”** If all of the conditions in paragraphs (b) through (f) of this rule are met, then a person acting as an Intermediary in connection with the sale or purchase of a business consummated as a conveyance of stock or other securities is not deemed to be a “broker-dealer” as defined in Section [\_\_\_\_] of the *Uniform Act*, an *M&A Broker* under Rule [\_\_\_\_], and a *Private Placement Broker* under Rule [\_\_\_\_].

(a) **Definition of Intermediary.** The term “Intermediary” means a person who engages in the activities described in paragraphs (b) through (f) of this rule.

(b) **Sale of a Small Business.** The business to be sold is a corporation, limited liability company, proprietorship or partnership which satisfies the size standards for a “small business” pursuant to the Small Business Size Regulations issued by the U.S. Small Business Administration, as those regulations may be amended from time to time. The business to be sold is a going concern and not a “shell” organization. The business, as a whole, or its assets are advertised or otherwise offered for sale, and the Intermediary will not promote the sale of securities. If the transaction is effected by means of the transfer, exchange, or issuance of securities, then all of the business’s equity securities are conveyed to a single buyer or group of buyers formed without the assistance of the Intermediary.

(c) **Intermediary’s Role.** The Intermediary is engaged to act as an agent of a seller, a buyer, controlling equity holders, or, to the extent permitted by state law, in the capacity of an independent, dual, or limited agent regarding multiple parties in connection with the transfer of ownership of the business. The Intermediary does not advise the parties whether to issue securi-

ties, or otherwise to effect the transfer of the business by means of securities, or assess the value of any securities sold (other than by valuing the assets of the business as a going concern). The Intermediary may prepare a detailed description of the business to be sold based on information supplied by the parties, including historical financial data, and publicly available information; provided, however, that the Intermediary apprise potential purchasers that the Intermediary makes no representations about the accuracy of the information provided.

(d) Intermediary's Compensation. The Intermediary's compensation in connection with the transaction is determined prior to the parties' decision on how to effect the transfer of ownership of the business and does not vary according to the legal structure of the conveyance (i.e., securities rather than sale of assets). The compensation may be calculated as a fixed fee, an hourly fee, a commission, or a combination thereof, that is based upon the consideration received by the seller. The compensation may be deferred to the same extent that the consideration paid by the buyer to the seller is deferred. If consideration to the seller from the buyer is paid in part at closing, and in part after closing, the Intermediary may likewise receive its compensation in part at, and in part after, closing. The amount of compensation may depend on the occurrence or nonoccurrence of future events. The formula to compute the compensation is fixed prior to the determination of whether to structure the transaction as a sale of the seller's assets or a sale of securities.

(e) Intermediary's Activities in a Securities Transaction. After the parties decide to effect the transaction through a sale of securities, instead of a sale of assets, thereafter:

(1) The Intermediary limits its services to: (i) transmitting documents between the parties; (ii) valuing the assets of the business as a going concern; (iii) providing one or more of the parties with administrative support; and (iv) assisting with the preparation or analysis of the business's financial statements;

(2) The Intermediary does not have or exercise the power to bind any party in the transaction;

(3) The Intermediary does not have custody or possession of funds of the parties in the transaction.

(f) Involvement with Financing. The Intermediary does not assist a buyer in obtaining financing, other than providing uncompensated introductions to third-party lenders and helping a buyer with preparing the paperwork and financial statements associated with loan applications.

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