

**Proposed SEC Rule and State Model Rule  
Regulating Intermediaries in Small Business Sales**

**Proposed Rule 15a-[ ], [Intermediaries in Small Business Sale Transactions]**

**Preliminary Note [SEC Rule]:** This rule codifies historical guidance provided by the SEC staff's 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 conforms its activities regarding transactions described in this rule is not covered under the definition of a "broker" under the *Securities Exchange Act of 1934* (the "Act") and is exempt from registration and other requirements applicable to a broker under the Act, including registration as an "M&A Broker" or a "Private Placement Broker" as those terms are used in Rules [ ] and [ ].

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

**Exclusion From Definition of a "Broker."** 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" as defined in Section 3(a)(4) of the *Act* (15 U.S.C. 78c(a)(4)), an "M&A Broker" under Rule [ ], or a "Private Placement Broker" under Rule [ ].

*[See the language for both the Federal and State rules below]*

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

**Preliminary Note [State Model Rule]:** 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 [ ].

***[Language for both the Federal and State rules:]***

(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 securities, 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.