

## **Licensure Task Force** **M&A Broker Proposals Update**

May 8, 2009

The Annual Spring Public Policy Conference of the North American Securities Administrators Association (“NASAA”) was held on April 28, 2009, in Washington D.C. At this conference, state securities regulators conduct both public and closed meetings among themselves and meet with staff members of the Securities and Exchange Commission (“SEC”). While there were no public announcements affecting the M&A Broker and the Small Business Sale Exemption (together, “M&AB”), or the Private Placement Broker (“PPB”) proposals, there were several encouraging developments to report to the Licensure Task Force and our many supporters.

During the conference, I was able to talk with NASAA President, Fred Joseph (Colorado Commissioner), NASAA President-Elect, Denise Voight Crawford (Texas Commissioner), and a number of other state securities commissioners about the proposals and was encouraged by their continuing support, though they are waiting for the SEC to advance the proposals to the public comment phase of federal rulemaking. The M&AB and PPB proposals were discussed during their closed-door session with the SEC staff. While in Washington D.C., I was able to meet for nearly an hour and a half with three senior members of the SEC Division of Trading and Markets (the “Division”), Paula Jenson (Deputy Chief Counsel), Brian Bussey (Assistant Chief Counsel), and Joanne Rutkowski (Special Counsel). We discussed the status and various aspects of the proposals. Several noteworthy points from this meeting and from the NASAA Conference:

### **Meeting with Senior SEC Staff**

1. The proposals have the support of the SEC Division’s staff. They are ready to advance the rulemaking process when the Commissioners’ policy-making priorities allow. The SEC’s priorities continue to be driven by Congress and the Obama Administration in dealing with the current financial crisis and the significant shortcomings of our current federal regulatory system. Several of those rulemaking priorities directly involve the Division and continue to monopolize its staffing resources. Given the daily Wall Street and Washington headlines, the staff would not make any prognostications about timing. Nonetheless, their feeling was that the current alignment and professional background of the SEC Commissioners and the Division’s staff have never been better for advancing the proposals.

2. We explored several aspects of our M&AB proposals in some detail and I addressed specific questions about the contours of the proposals. This discussion evidenced the depth of the staff’s understanding and their familiarity with our proposals. The staff continue to be interested in the concept and measurement of some kind of size cap on exempted M&A activities, as well as the anticipated reaction of registered broker-dealers to the potential size of exempted transactions. We also discussed the importance of registered and exempt M&A firms being able to refer and share compensation to facilitate deal flow based on the professionals’ qualifications, expertise, and cost to clients. They understand the profession’s need for simplicity and certainty in assessing potential engagements before significant time and resources

are invested by the intermediary. The short-comings of using the Small Business Administration's size standards as the yard stick were acknowledged, and the staff appear to be open to using more than one methodology for measurement.

3. We explored other potential obstacles, including any perception that the proposals could be characterized as "deregulatory" in nature, in the face of public and Congressional pressure to dramatically tighten federal financial services regulation. Evidencing the staff's support, they said it was "their job" to explain to the SEC Commissioners why the proposals did not deregulate these activities. Among other things, we noted the fact that M&A transactions typically involve actively involved parties (in contrast to passive investors), negotiated terms, and the participation of lawyers, accountants, bankers, and other third-party advisors. As a result, there has been no history of investor complaints to regulators. Indeed, the staff do recognize that investor protection is enhanced by appropriately and cost-effectively scaling federal and state securities regulation of M&A activities to serve smaller and medium-sized businesses who securities are not publicly traded.

4. While there have been many staffing changes within the Division, all vacant positions have now been filled. James Brigagliano and Daniel M. Gallagher have been named as Co-Acting Directors of the Division, both with substantial SEC experience. Joanne Rutkowski succeeds Kristina Fausti, who recently left the SEC for the private sector. Accolades of Ms. Faust's thoughtful analysis, organization, and file-keeping on our proposals from her successor, echoed by her former boss, demonstrate that substantial staff-level work on the proposals has been accomplished, which will facilitate a smooth transition of responsibilities to Ms. Rutkowski, who has substantially more experience with the SEC and, before an hiatus as a partner in a Washington D.C. law firm, served as an associate director in another SEC division.

### **State-Level Support**

5. As noted above, several key members of NASAA's current leadership support the proposals. The SEC staff has become aware of the interest among state regulators in advancing the proposals. During our meeting, Mr. Bussey remarked that, during the morning's closed-door session with state regulators, a state securities commissioner had asked about the status of the M&AB proposals before he had gotten that far through his agenda. He complimented our team's efforts at educating and encouraging the states' interest in the proposals.

### **Next Steps**

6. Our next objective is to capture the attention of the SEC Commissioners. Two upcoming developments will ably serve that purpose. First, the final report and recommendations of the 2008 Government-Business Forum on Small Business Capital Formation, held on November 20, 2008, will soon be forthcoming. Like these reports for the 2006 and 2007 Forums, the 2008 report is expected to recommend the SEC's adoption of the M&AB and PPB proposals. Second, a broad-based working group of AM&AA and IBBA members have been gathering and analyzing transactional data, as well as data about the scope and scale of the profession, for a white paper that, when finalized, will be presented to federal and state regulators. The 2008 report and the LTF's white paper will underscore both the need

and the demand supporting the adoption of the proposals. Both documents will be sent to the SEC Commissioners and their staff, including a request to meet with them to review and educate them about our proposals.

7. The next meeting of state securities regulators will occur at NASAA's 2009 Annual Meeting in Denver, Colorado, September 13-16, 2009. We will be working to arrange for a working session with the NASAA Finders Project Group, which continues to be chaired by Tanya Solov (Illinois Commissioner).

8. Finally, we will continue to coordinate communications and efforts with the ABA PPB Task Force. The Task Force's co-chair, Faith Colish, recently emphasized the substantial "economic stimulus" effect the adoption of the proposals would have in our economy—without a dime of federal taxpayers' money. I reiterated that point during my meeting with the SEC staff.

The collective efforts of the Licensure Task Force team have positioned us well to advance all of the proposals. Were it not for last year's debacles and scandals in our nation's financial markets, we might well have accomplished our objectives already. Those issues should largely be resolved in the coming months, allowing historical priorities to regain their urgency. We look forward to significant advancements of the proposals with both the SEC and NASAA soon thereafter. Let me know if you have any questions.

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