DAVIS MILES, PLLC

B2B CFO
Series 79 License Affects the CFO

Friday, April 30, 2010

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Special thanks to attorney
Jason M. Ray, LLM for his assistance in preparing these materials

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First, the Series 79 License became effective November 2, 2009 and is primarily applicable in the investment banking context and involves the sale or exchange of securities. However it is not limited to that context. As far back as 2004, discussions were initiated in the regulatory agencies to garner a firmer hold on the "finders." This evolved into the adoption by FINRA and approval by the SEC of the new Series 79 License requirement.

Background

An investment bank is a financial institution that assists companies involved in mergers and acquisitions, and divestitures. Investment banks also work with corporations and governments in raising capital by underwriting and acting as the agent in the issuance of securities. As part of these services these institutions also provide related services of market making and the trading derivatives, fixed income instruments, foreign exchange, commodity, and equity securities.

These investment banking services can only be provided by licensed broker-dealers in the United States. Such advisors are subject to Securities & Exchange Commission (SEC) and Financial Industry Regulatory Authority (FINRA, f/k/a the National Association of Securities Dealers, Inc. (NASD)) regulations. Until 1999, the United States maintained a separation between investment banking and commercial banks. Prior to that, trading securities for cash or securities (i.e., facilitating transactions, market-making), or the promotion of securities (i.e., underwriting, research, etc.) was referred to as the "sell side". Dealing with the pension funds, mutual funds, hedge funds, and the investing public who consumed the products and services of the sell-side in order to maximize their return on investment constituted the "buy side". Many firms now have buy and sell side components.

Individuals or entities acting as unregistered financial intermediaries, "finders" or "investment bankers" ("finders") are a major issue in corporate finance transactions and mergers and acquisitions. For the most part, these persons are unregistered broker-dealers under federal and state securities laws, and therefore transactions in which they are involved jeopardize the issuer, its officers and directors, and other investors because of the use of the unregistered/non-exempt person. What exacerbates the situation is that some of these individuals also have adverse regulatory histories or were closely affiliated with those who do, and some even have been barred or suspended from broker-dealer or agent registration by regulators or convicted of financial fraud. All to often, these tainted individuals promote financial arrangements that do not work to the advantage of the company pursuing a merger or financing, and call into question the legality of transactions in which they are involved. Some promote the use of "shell corporations," which almost invariably involve significant fraud both on those who purchase or merge

with the shells, and in the subsequent after-market for the stock of the entity into which the shell is merged.

Truthfully, the majority of the finders are reputable people, who provide a major service in locating and referring capital to small businesses who without this assistance would be largely shut out from obtaining sufficient capital. Competent, reputable finders provide significant positive aspects for these companies. They can provide the right candidate for a merger or acquisition; they can find an angel for an emerging company; they can locate mezzanine financing; and they can open doors to venture capitalists and other financial resources otherwise not available to an entity seeking capital. Their experience and contacts make it likely that introductions are made to strong, reputable and committed investors on behalf of the emerging companies.

What is a Security?

It is important to understand what a security is in order to determine whether it is necessary to be licensed.

The federal definition is found in section 2(a)(1) of the Securities Act of 1933, "unless the context otherwise requires," the term "security" includes:

> Any note, stock, treasury stock, security future, bond, debenture evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The Arizona definition is found in the Arizona Revised Statutes section 44-1801 and is defined as:

> Any note, stock, treasury stock, bond, commodity investment contract, commodity option, debenture, evidence of indebtedness certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, viatical or life settlement investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, real property investment

> contract or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The seminal case in determining if a financial instrument is a security is SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

The Howey Company was a Florida corporation that sold small tracts of land in a citrus grove to 42 purchasers, many of whom were patrons of a nearby resort hotel. The purchasers, for the most part, lacked the knowledge, skill, and equipment necessary for the care and cultivation of citrus trees. And while the purchasers were free to service the tracts themselves, or contract with a number of companies to service the tracts for them, the sales contract stressed the superiority of a Howey-related service company. Eighty five percent of the investors chose to service their tracts through the related company. The service contracts granted full and complete possession to the servicer and the investors had no right of entry to market the crop, but shared in the profits of the enterprise, which amounted to 20 percent in the 1943-44 growing season.

The Howey Company did not register the interests in the enterprise as securities. The SEC brought an action to enjoin the sale of the citrus grove interests. Because the interest at issue did not constitute any of the specific, traditional kinds of securities found in Section 2(a)(1) of the Securities Act, the SEC argued that the interests were "investment contracts." Noting that the term "investment contract" had not been defined by Congress but was widely used in state securities laws, the Supreme Court adopted the definition used by most state courts and held that an investment contract is a security under the Securities Act if investors purchase with **(1) an expectation of profits arising from (2) a common enterprise that (3) depends "solely" for its success on the efforts of others**. Applying this test, the Court found that the interests in the citrus grove sold by the Howey Company were "investment contracts," and thus securities, subject to the Securities Act.

In 1982, the Supreme Court reinforced the expansiveness of the definition of security in Marine Bank v. Weaver, 455 U.S. 551, (1982). The Court interpreted the definition of "security" under the Securities Exchange Act of 1934 in virtually the same way, acknowledging that the definition is "quite broad" and is meant to include "the many types of instruments that in our commercial world fall within the ordinary concept of a security," including "stocks and bonds, along with the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."

How does this Apply

SEC registration requirements only apply to the brokerage firm itself or brokers not associated with a brokerage firm. Associates of the brokerage firm need not register with the SEC, but should register with the FINRA. What follows are some factual examples of the analysis by the regulatory agencies.

A broker-dealer that solicited investors over a four-year period violated section 15(a)(1) for failing to register since the broker 'had a certain regularity of participation in securities transactions.'

In another instance, the purchase of several million dollars' worth of securities provided sufficient regularity of purchase to satisfy the phrase 'engaged in the business.'

Single Event v. Multiple

An individual might not be acting as a broker or a dealer if, 'on a single, isolated basis,' the individual advertised an interest to engage in securities transactions for his own account.

> **Example 1**: Officers and directors of a corporate general partner of an oil and gas exploration limited partnership were advised by the staff that they would not be engaged in the business of effecting transactions in securities if they sold units in the limited partnership since in the past they had not engaged in the offer and sale of other securities. Also, these officers and directors did not ever intend to sell securities of any other issuer.
>
> However, if the advertising were 'engaged in more often than on a single isolated basis,' broker-dealer registration would be required.
>
> **Example 2**: On the contrary, a real estate investment company, whose employees were to sell units in a limited partnership, was required to register under section 15(a)(1). The company previously had made a similar offering of comparable securities and its employees perhaps were going to be involved in future offerings of similar securities. The staff concluded that the company appeared to be selling securities on a 'recurring basis.'

Badges of Broker- Dealer Activities

Generally these consist of the following: (a) Buying and selling securities for one's own account; (b) Effecting transactions for others; (c) Earning of a commission; (d) Solicitation of business; (e) Past and intended employment in the securities business; (f) Ad hoc badges

Special Issues

Self-sale approach: issuers sell their own securities through their officers and employees.

a. Whether the issuer is a broker/ dealer - An issuer cannot be a dealer since it is not both buying and selling its securities. Furthermore, the issuer should not be

considered a broker because the securities are not sold for the ‘account of others'; rather, they are being sold by the issuer for its own account.

b. Whether the employee of the issuer is a broker/ dealer-

(1) Whether the employee is under the issuer's supervision (i.e., whether he is an employee or an independent contractor). Actual employees are less likely to be required to register.

(2) Whether the employee's compensation will be linked to the amount of securities sold or whether it is a fixed compensation. Employees receiving a fixed compensation are less likely to be required to register.

(3) Whether the employee devotes a substantial portion of his time to rendering services for the issuer that are not related to the sale of securities. Employees providing nonsecurities selling services are less likely to be required to register.

(4) Whether the employee intends to remain with the issuer after completion of the offering. Employees intending to remain are less likely to be required to register.

(5) Whether the employee participated in the past, or whether the employee will in the future participate, in other securities offerings by this or other issuers. Employees participating in other offerings are more likely to be required to register.

Previously finders were considered to be in the business of identifying suitable companies for acquisition or merger in deals that might be structured through the sale of securities. Other finders or ‘channelers' were in the business of merely directing customers to brokers and dealers, or businesspersons who are engaged in locating investors for a business seeking to raise capital. In these instances, the rationale for a finder's exemption was that he did not satisfy the section 3(a)(4) definition of a broker because he is not ‘effecting’ transactions for others. Rather, the finder argued that his activities were limited to identifying potential purchasers or sellers of securities and that the negotiation and execution of the actual transaction was left to others.

Factors

1. While certain factors were relied on in the past such as whether the finder was involved in negotiations for the sale of the securities. Finders involved in negotiations are going to be required to register as a broker-dealer. While a finder may rationalize that he is not involved in negotiations, the change indicates a belief on the regulatory side now that it does not take much to be “involved in the negotiations.’

2. Whether the finder discussed details of the nature of the securities sold or whether he made any recommendations. Discussions of details and making recommendations increase the likelihood that registration would be required.

3. Whether the finder was compensated on a commission basis linked to sales. Sales volume linked commissions would increase the likelihood that registration would be required.

4. Whether the finder previously was involved in sales of securities. Previous involvement increases the likelihood that registration would be required.

Essentially, the first three factors are guidelines to determine whether the finder is in the sort of relationship with a customer that would allow the customer to be exposed to potential abusive sales practices. The fourth factor seeks to determine whether there is sufficient reoccurrence of sales of securities to suggest that the finder is in the 'business' of effecting transactions.

Registration under the 1934 Act has been required if the investment adviser: (a) executes transactions for its clients; (b) charges fees based upon the amount of securities transactions effected by its clients; or (c) takes possession of its clients' funds or securities.

The payment of advisory fees based upon the amount of securities bought or sold is, by itself, a basis for requiring broker-dealer registration.

d. Pooling of customer orders with one another and with an adviser's own orders under the adviser's name can lead to problems.

Activities that have been found by the staff not to trigger broker-dealer registration or Series 79 licensing are: (a) determining and giving advice on applicable law; (b) advising upon antifraud concerns; (c) advising an issuer on its financial potential and recommending methods of financing; (d) advising upon and preparing appropriate disclosure documents and clearing them with appropriate government agencies; (e) providing appropriate debt instruments; (f) advising the issuer as to necessary charter amendments; (g) making arrangements with a bank for retiring debt instruments and payment of principal and interest; (h) advising an issuer about clerical work involved in selling bonds; (i) suggesting to an issuer procedures for selling bonds; (j) suggesting a date of sale; and (k) suggesting investment opportunities for temporarily idle proceeds of an offering.

On the other hand, sales of securities, receipt of commission fees based upon securities sold, and holding funds on securities have been specifically identified as activities in which financial consultants cannot engage and still maintain an exception from broker-dealer registration or Series 79 requirements.

As professionals, certified public accountants develop a trust and rapport with their clients that leads to the client's desire to have their CPA involved in decisions that have financial aspects but are not necessarily limited to the average range of services provided by CPA's. This is a good thing for clients because of both the business and financial experience that most seasoned CPA's possess. This applies perhaps even more for Chief Financial Officers. There exists exposure to the new Series 79 when the CPA/CFO assists in preparing and analyzing the financials that are utilized in promoting the issuance of securities or the negotiation of the merger and acquisition. It should be noted that even the Regulation D and Private Offering activities have the Series 82 Licensing requirement.

Unfortunately, as we will see, the SEC and FINRA have established a regulation that applies a broader definition to broker/dealer actions and affiliates and the efforts of CPA's that normally would be made on behalf of clients is now being drawn under the definition of broker/dealer. Because B2B CFO's are independent contractors and not employees of the businesses they serve, this opens the application of this new FINRA regulation to this industry perhaps more than to the normal CPA and CFO.

FINRA Series 79

NASD Rules 1022 and 1032 were amended effective November 2, 2009 requiring individuals whose activities are limited to investment banking and principals who supervise such activities to take and pass the new Limited Representative – Investment Banking Qualification Examination (Series 79 Exam). Individuals who are registered as a General Securities Representative (Series 7) and engage in the member firm's investment banking business as described in NASD Rule 1032(i) may "opt in" to the new registration category by May 3, 2010. [See Exhibit A for changes]

NASD Rule 1032(i), initially adopted in May of 2009, requires an associated person to register with FINRA as a Limited Representative – Investment Banking (Investment Banking Representative) and pass a corresponding qualification examination if such person's activities involve:

(1) advising on or facilitating debt or equity securities offerings through a private placement or a public offering, including but not limited to origination, underwriting, marketing, structuring, syndication, and pricing of such securities and managing the allocation and stabilization activities of such offerings, or

(2) advising on or facilitating mergers and acquisitions, tender offers, financial restructurings, asset sales, divestitures or other corporate reorganizations or business combination transactions, including but not limited to rendering a fairness, solvency or similar opinion.

The registration category does not cover individuals whose investment banking work is limited to public (municipal) finance or direct participation programs as defined in NASD Rule 1022(e)(2). Moreover, individuals whose investment banking work is limited to

effecting private securities offerings as defined in NASD Rule 1032(h)(1)(A) may continue to function in such capacity by registering as a Limited Representative – Private Securities Offerings and passing the corresponding Series 82 exam.

The important thing to keep in mind is that the new regulations identify affiliates or associates as potential finders that must be licensed. So if an individual has any connection at all with a broker/dealer, that person has to be licensed. In addition, if there is no affiliation, finders are now included in the licensing requirement

Sections 15 and 29 of the Securities Exchange Act of 1934 require licensing of broker/dealers. The practical downside of not being licensed is that any contracts for fees or commissions are void if the party seeking payment under the contract is not licensed.

Section 3(a)(4)(A) of the Securities Exchange Act of 1934 generally defines a "broker" broadly as any person engaged in the business of effecting transactions in securities for the account of others.

Sometimes you can easily determine if someone is a broker. For instance, a person who executes transactions for others on a securities exchange clearly is a broker. However, other situations are less clear. For example, each of the following individuals and businesses may need to register as a broker, depending on a number of factors; "**finders**," "**business brokers**," and other individuals or entities that engage in the following activities:

1. Finding investors or customers for, making referrals to, or splitting commissions with registered broker-dealers, investment companies (or mutual funds, including hedge funds) or other securities intermediaries;

2 Finding investment banking clients for registered broker-dealers;

3. Finding investors for "issuers" (entities issuing securities), even in a "consultant" capacity;

4. Engaging in, or finding investors for, venture capital or "angel" financings, including private placements;

5. Finding buyers and sellers of businesses (i.e., activities relating to mergers and acquisitions where securities are involved);

6. investment advisers and financial consultants;

7. foreign broker-dealers that cannot rely on Rule 15a-6 under the Act (discussed below);

8. persons that operate or control electronic or other platforms to trade securities;

9. persons that market real-estate investment interests, such as tenancy-in-common interests, that are securities;

10. persons that act as "placement agents" for private placements of securities;

11. persons that market or effect transactions in insurance products that are securities, such as variable annuities, or other investment products that are securities;

12. persons that effect securities transactions for the account of others for a fee, even when those other people are friends or family members;

13. persons that provide support services to registered broker-dealers; and

14. persons that act as "independent contractors," but are not "associated persons" of a broker-dealer (for information on "associated persons," see below).

In order to determine whether any of these individuals (or any other person or business) is a broker, the SEC looks at the activities that the person or business actually performs. The analysis of various activities can be found in the decisions of federal courts and SEC no-action and interpretive letters. Here are some of the questions that you should ask to determine whether you are acting as a broker:

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

A "yes" answer to any of these questions indicates that you may need to register as a broker.

Individuals who work for a registered broker-dealer are "associated persons." Whether such individuals are employees, independent contractors, or are otherwise working with a broker-dealer **does not** make a difference. These individuals may also be called "stock brokers" or "registered representatives." Although associated persons usually do not have to register separately with the SEC, they must be properly supervised by a currently registered broker-dealer. They may also have to register with the self-regulatory

organizations of which their employer is a member — for example, FINRA or a national securities exchange. To the extent that associated persons engage in securities activities outside of the supervision of their broker-dealer, they would have to register separately as broker-dealers.

The SEC does not differentiate between employees and other associated persons for securities law purposes. Broker-dealers must supervise the securities activities of their personnel regardless of whether they are considered "employees" or "independent contractors" as defined under state law. See, for example, In the matter of William V. Giordano, Securities Exchange Act Release No. 36742 (January 19, 1996).

No Action Letter Examples

What follows are some examples of analysis contained in the opinions of the regulatory agencies that licensing is required: John M. McGivney Securities, Inc., SEC No-Action Letter (May 20, 1985). The SEC has left open whether a commission-like fee arrangement, standing alone, will always constitute grounds for registration as a broker-dealer. It is this letter which appears to create the greatest uncertainty for counsel and intermediaries. Herbruck, Alder & Co., SEC No-Action Letter (June 4, 2002); see also, e.g., Birchtree Financial Services, Inc. (SEC No-Action Letter Sept. 22, 1998) (registered representative's personal service corporations); 1st Global, Inc. (SEC No-Action letter May 7, 2001)(unregistered CPA firms); Richard S. Appel, SEC No-Action Letter (Feb. 14, 1983) (1031 exchange transactions; requiring registration because finder would receive commission-based compensation on sales). Transaction based compensation triggered a broker-dealer registration obligation in Mike Bantuveris, SEC No-Action Letter (Oct. 23, 1975), where the company wished to offer a consulting service in which it would identify companies as possible acquisition candidates and assist its clients in negotiating toward a final agreement. The company proposed to base its fees, in part, on the total value of consideration received by the sellers or paid by the buyers. On these facts, the staff indicated that the company would be required to register as a broker-dealer. The staff noted that its opinion was "based primarily on the fact that the consulting firm would . . . receive fees for its services that would be proportional to the money or property obtained by its clients and would be contingent upon such transactions in securities."

Celebrity Exemption

Paul Anka, SEC No-Action Letter (July 24, 1991), provides the unusual case where a commission-like fee has been allowed to stand. The staff's favorable position would appear to be attributable to the uniquely limited duties of the finder involved in the case and to the one-time occurrence of the event. In Anka, the Ottawa Senators Hockey Club retained entertainer Paul Anka to act as a finder for purchasers of limited partnership units issued by the Senators. Anka agreed to furnish the Senators with the names and telephone numbers of persons in the United States and Canada whom he believed might be interested in purchasing the limited partnership units. Anka would neither personally contact these persons nor make any recommendations to them regarding investments in

the Senators. It is noteworthy that in Mr. Anka's original proposal letter to the SEC he would have made the initial contact with prospective investors, but the SEC would not issue a no-action letter under those facts. In exchange for his services, Anka would be paid a finder's fee equal to 10 percent of any sales traceable to his efforts. Important factors identified in the Anka letter include:

- Mr. Anka had a bona fide, pre-existing business or personal relationship with these prospective investors.
- He reasonably believed those investors to be accredited.
- He would not advertise, endorse or solicit investors.
- He would have no personal contact with prospective investors.
- Only officers and directors of the Senators would contact the potential investors.
- Compensation paid to the Senators' officers and directors would comply with 1934 Act Rule 3a4-1 (governing compensation to issuer's agents).
- He would not provide financing for any investors.
- He would not advise on valuation.
- He would not perform due diligence on the Senators' offering.
- He had never been a broker-dealer or registered representative of a broker-dealer.

Based on these facts, the SEC indicated that it would not recommend enforcement action if Anka engaged in the proposed activities without registering as a broker-dealer.

COMMON LAW APPLICATIONS

Torsiello Capital Partners LLC v. Sunshine State Holding Corp. involved a financial advisory company that assisted Sunshine in the sale of the company. The company was not sold during Torsiello's contract but was sold several months later. The Court voided the contract because Torsiello was not a licensed broker/dealer. Mr. Torsiello, owner of Torsiello Capital Partners, LLC, was a certified public accountant.

Warfield v. Alaniz, June 24, 2009 (Federal District Court for Arizona), held that the nature of compensation is critical.

Attached as Exhibit B is a listing of applicable cases indicating the nature of the cases and the compensation of the professionals involved. The Courts are leaning very strongly in the direction of requiring licensing. What most professionals would consider private transactions, whether mergers or acquisitions, are now coming under the regulatory purview requiring the professionals to be licensed.

EXHIBIT A

Text of Amended Portions of the Rule
1022. Categories of Principal Registration

(a) General Securities Principal

(1) Each person associated with a member who is included within the definition of principal in Rule 1021, and each person designated as a Chief Compliance Officer on Schedule A of Form BD, shall be required to register with the Association as a General Securities Principal and shall pass an appropriate Qualification Examination before such registration may become effective unless such person's activities are so limited as to qualify such person for one or more of the limited categories of principal registration specified hereafter. A person whose activities in the investment banking or securities business are so limited is not, however, precluded from attempting to become qualified for registration as a General Securities Principal, and if qualified, may become so registered. (A) Subject to paragraphs (a)(1)(B), (a)(2) and (a)(5), [E]each person seeking to register and qualify as a General Securities Principal must, prior to or concurrent with such registration, become registered, pursuant to the Rule 1030 Series, either as a General Securities Representative or [as] a Limited Representative-Corporate Securities. (B) A person seeking to register and qualify as a General Securities Principal who will have supervisory responsibility over investment banking activities described in NASD Rule 1032(i)(1)must, prior to or concurrent with such registration, become registered as a Limited Representative– Investment Banking. (C) A person who has been designated as a Chief Compliance Officer on Schedule A of Form BD for at least two years immediately prior to January 1, 2002, and who has not been subject within the last ten years to any statutory disqualification as defined in Section 3(a)(39) of the Act; a suspension; or the imposition of a fine of $5,000 or more for violation of any provision of any securities law or regulation, or any agreement with or rule or standard of conduct of any securities governmental agency, securities self-regulatory organization, or as imposed by any such regulatory or self-regulatory organization in connection with a disciplinary proceeding shall be required to register as a General Securities Principal, but shall be exempt from the requirement to pass the appropriate Qualification Examination. If such person has acted as a Chief Compliance Officer for a member whose business is limited to the solicitation, purchase and/or sale of "government securities," as that term is defined in Section 3(a)(42)(A) of the Act, or the activities described in Rule 1022(d)(1)(A) or Rule 1022(e)(2), he or she shall be exempt from the requirement to pass the appropriate Qualification Examination only if he or she registers as a Government Securities Principal, or a Limited Principal pursuant to Rules 1022(d) or Rule 1022(e), as the case may be, and restrict his or her activities as required by such registration category. A Chief Compliance Officer who is subject to the Qualification Examination requirement shall be allowed a period of 90 calendar days following January 1, 2002, within which to pass the appropriate Qualification Examination for Principals.

1032. Categories of Representative Registration

(i) Limited Representative-Investment Banking (1) Each person associated with a member who is included within the definition of a representative as defined in NASD Rule 1031 shall be required to register with FINRA as a Limited Representative-Investment Banking and pass a qualification examination as specified by the Board of Governors if such person's activities involve: (A) advising on or facilitating debt or equity securities offerings through a private placement or a public offering, including but not limited to origination, underwriting, marketing, structuring, syndication, and pricing of such securities and managing the allocation and stabilization activities of such offerings, or (B) advising on or facilitating mergers and acquisitions, tender offers, financial restructurings, asset sales, divestitures or other corporate reorganizations or business combination transactions, including but not limited to rendering a fairness, solvency or similar opinion.

(2) Notwithstanding the foregoing, an associated person shall not be required to register as a Limited Representative-Investment Banking if such person's activities described in paragraph (i)(1) are limited to: (A) advising on or facilitating the placement of direct participation program securities as defined in NASD Rule 1022(e)(2); (B) effecting private securities offerings as defined in paragraph (h)(1)(A); or (C) retail or institutional sales and trading activities.

(3) An associated person who participates in a new employee training program conducted by a member shall not be required to register as a Limited Representative-Investment Banking for a period of up to six months from the time the associated person first engages within the program in activities described in paragraphs (i)(1)(A) or (B), but in no event more than two years after commencing participation in the training program. This exception is conditioned upon the member maintaining records that: (A) evidence the existence and details of the training program, including but not limited to its scope, length, (B) identify those participants whose activities otherwise would require registration as a Limited Representative-Investment Banking and the date on which each participant commenced such activities.

(4) Any person qualified solely as a Limited Representative-Investment Banking shall not be qualified to function in any area not described in paragraph (i)(1) hereof, unless such person is separately qualified and registered in the appropriate category or categories of registration.

(5) Any person who was registered with FINRA as a Limited Representative-Corporate Securities or General Securities Representative (including persons who passed the UK (Series 17) or Canada (Series 37/38) Modules of the Series 7) prior to [effective date of the proposed rule change], shall be qualified to be registered as a Limited Representative-Investment Banking without first passing the qualification examination set forth in paragraph (i)(1), provided that such person requests registration as a Limited Representative-Investment Banking within the time period prescribed by FINRA.

EXHIBIT B

Case Table – Broker/ Dealer Registration with the SEC

15 U.S.C. §78o(a)(1) states "It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section. "

Under 15 U.S.C. § 78c(a)(4), the term "broker" means any person engaged in the business of effecting transactions in securities for the account of others. Under 15 U.S.C. § 78c(a)(4) the term "dealer" means any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise. Case law and SEC non-determination letters have further clarified who should be considered as a broker or dealer.

Factors taken from the unpublished decision from the Supreme Court of New York Torsiello Capital Partners LLC v. Sunshine State Holding Corp. provide a good way to analyze each case and reconcile any differences

1. Commission based v. flat fee
2. Rendering advice about the structure
3. Price or desirability of the securities transaction
4. The finding of investors actively, as opposed to passively
5. Advertisement or solicitation on behalf of the issuer of the securities
6. Becoming involved in negotiations between the issuer and investors
7. Engaging in the foregoing with regularity
8. Being an employee of the issuer
9. Possession client funds and securities

If a person violates 15 U.S.C. §78o(a)(1) by selling securities as a broker or dealer, the contracts made are void under 15 U.S.C. §78cc(b).

Case	Commission v. Flat	Render advice about structure	Price of securities transaction	Finding of investors	Advertising Soliciting on behalf of issuer	Extent of Involvement between Issuer & Investor	Regular participation in securities transactions	Employee of Issuer	Possess client funds and securities	Should have registered as Broker or Dealer?
Servicesence	Unknown	Unknown	$2-3 Million[i]	Unknown	Allegation that Attorneys convinced investors[ii]	Attorneys represented issuer in negotiations w/ investor[iii]	6 transactions[iv]	No	Unknown	Yes, but the violation was tangential to the contract, and thus did not void it[v]
Lawrence	Yes[vi]	Yes. Lawrence approached Bank about investment in affordable housing. [vii]	$20-$40 million[viii]	Yes[ix]	Yes. If successful, Lawrence would have exclusive right to market.[x]	Lawrence purported to have an exclusive service contract between the bank and registered clients.[xi]	Yes. Lawrence would have exclusive right to market.[xii]	No	unknown	Lawrence acted outside the scope of his authority and the contract was void[xiii]
George	Ponzi scheme[xiv]	Ponzi Scheme- purportedly invest in secretive European market[xv]	$75.8 million[xvi]	Yes. Personal communication with investors and advertising[xvii]	They purported to, but in reality there was no issuer. Funds were used to pay fraudulent returns[xviii]	Purported to have direct involvement with European issuers who provided preferred rates of return[xix]	Yes. Regularly involved in recruitment of investors for purchase of securities[xx]	No	Yes[xxi]	Yes broker. Also guilty of securities fraud.[xxii]
Martino	Commission[xxiii]	Advised investors regarding sale terms that Chippewa favored[xxiv]	$20 million[xxv]	Regularly acted as middleperson and soliciting potential purchasers[xxvi]	Regularly solicited overseas clients, furnished potential purchasers with Company info[xxvii]	Intimately involved at all points- maintained constant contact, acted as middle person[xxviii]	Participated in securities transactions at "key points in chain of distribution"[xxix]	No[xxx]	Unknown	Yes. She acted as a broker while under suspension from the SEC[xxxi]
Couldock & Bohan Inc.	The difference between the buyer price and the seller price[xxxii]	No	Unknown	Regularly acted as middlemen between sellers and buyers over four years[xxxiii]	CBI found a buyer & seller, then simultaneously bought and sold the securities[xxxiv]	Two separate transactions. One with seller and one with buyer. Spread was profit.[xxxv]	Unknown	No	Yes, as a technicality [xxxvi]	Yes. Acted as a broker-dealer[xxxvii]

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Randy	Commission [xxxviii]	Created fraudulent bank in Granada & sold CD's [xxxix]	$1.7 million - CD were securities b/c they were not FDIC insured, [xl]	Yes. Taught Seminars [xli]	Called investors & distributed advertising material [xlii]	This person created a fraudulent issuer- based out of Illinois [xliii]	Yes. Actively sought effect transactions in securities [xliv]	No	Possessed client funds [xlv]	Yes. Should have registered as broker/ dealer [xlvi]
Kenton	Commission [xlvii]	Met w/ persons from different trading programs, arranged for surety bonds [xlviii]	$17.5 million in pledges $1.7 million Collected [xlix]	Yes [l]	Yes [li]	K Leased out US Treasury bills to X, who borrowed 90% of face value and traded borrowed amount in off-shore investments [lii]	Kenton was established to sell securities [liii] and Kenton held itself out as being engaged in the business [liv]	No. Wallace was the founder of Kenton and solicited on Kenton's behalf [lv]	Yes [lvi]	Yes. Should have registered b/c it was "engaged in the business" as a broker/ dealer [lvii]
Deyon	Commission- spread between 25%/ month return promised & 15% return investors accepted [lviii]	Advised investing in Mexican Bank which yielded high return [lix]	Unknown. One representative received ill-gotten gains of $41,646 [lx]	Yes. Phone Solicitations, distributed sale circulars [lxi]	Yes, on behalf of Mexican Bank [lxii]	Took two potential investors to Mexican Bank located in Florida [lxiii]	Claimed to have persons prepared to invest $500 million [lxiv]	No	Yes	Yes [lxv]
Nat'l. Executive Planners	Fraudulent scheme [lxvi]	No	$4.3 million [lxvii]	Yes. "saturated airwaves with ads and TV commercials" [lxviii]	Yes. NEP salesman solicited over 4 years [lxix]	Extensive. NEP sold securities on behalf of issuer TVM [lxx]	Solicited clients actively [lxxi]	No	Yes. [lxxii]	Yes [lxxiii]
UFITEC	Commission [lxxiv]	No	$10 million in total security purchases -20% for own account -Remainder for clients [lxxv]	UFITEC's partner bought securities on behalf of UFITEC & UFITEC clients [lxxvi]	Unknown	-UFITEC loaned funds to Partner (to buy/ sell securities of Partner's choice) on UFITEC's behalf, - $381,979 total loss [lxxvii]	Yes, although it was only 3-4% of lending business [lxxviii]	No	Yes [lxxix]	Yes [lxxx]

Case	Commission v. Flat	Render advice about structure	Price of securities transaction	Finding of investors	Advertising Soliciting on behalf of issuer	Extent of Involvement between Issuer & Investor	Regular participation in securities transactions	Employee of Issuer	Possess client funds and securities	Should have registered as Broker or Dealer?
Hansen	Commission [lxxxi]	No	$2,666,667 roughly (based off 15%/ total 400k commissions in over 26 transactions) [lxxxii]	Yes. ads in newspapers, seminars and social events, and used gifts, bumper stickers [lxxxiii]	Yes. Gave investors extensive advice regarding oil and gas interests [lxxxiv]	Received commission from issuer [lxxxv]	Yes. Hansen was an active, aggressive finder of investors who gave extensive advice regarding merits of programs [lxxxvi]	No	Unknown	Yes [lxxxvii]
Ridenour	The difference between the buyer price and the seller price [lxxxviii]	No	$470,287.23 in profits [lxxxix]	Investors came to him because of his expertise in bond market [xc]	No	He sometimes bargained with clients on both ends of the transaction [xci]	Worked for his own account in a series of transactions [xcii]	No	Yes	Yes [xciii]
Torsiello	Commission- 3.5% of total purchase price, with a $50,000 retainer [xciv]	Provide Financial Advisory and investment banking services [xcv]	Business sold for $10.7 million to an indirect 16% owner [xcvi]	Did marketing strategy. Called 240, Identified 57, negotiated with 11 investors [xcvii]	Actively finding purchasers [xcviii]	Act as sole agent for private placement of equity or equity linked securities and debt [xcix]	In the business of selling business, including securities [c]	No	Yes	Yes. Contract was void ab initio [ci]

1. Charitable security exemption-

1. Warfield- "15 U.S.C. 78 l(g)(2)(D) [e]xempts from provisions of 1934 Act, except for anti-fraud provisions, any security issued by a charitable organization. … The limiting language [] left open the possibility that charitable organizations maintaining charitable income funds were ineligible for the exemption because the "donor" to such a fund (or the purchaser of a gift annuity) receives part of the net earnings of the organization in the form of periodic income. … [S]ection 4(b) of the Philanthropy Act specifically amended the 1934 Act to provide that persons selling securities on behalf of a "fund excluded from the definition of an investment company under [§ 80a-3(c)(10)(B)]" are exempt from the 1934 Act's broker-dealer regulations (including registration provisions) unless these persons are compensated for their sale of the securities.

2. Engaged in the business-

16. UFITEC- The phrase "engaged in the business" connotes a certain regularity of participation in purchasing and selling securities, but there is no requirement such activity be a person's principal business or principal source of income. … The purpose of the margin requirement could be effectively defeated if large businesses in this country were permitted to use a small percentage of their total activity to lend in excess of the margin requirement.

3. Associated Person-

6. Zahareas- "The dispositive issue is whether Zahareas was "controlled by" Tuschner. … The statute defines 'associated person' as 'Any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer.' "

For purposes of defining an "associated person under 15 U.S.C. § 78c(a)(18), the following applies:

A. Controlling access to a particular security doe not make the potential buyers controlled by the seller.
B. The ability of a broker to direct the transfer of the broker's accounts from one person to another only shows the brokers ability to assert rights over his own accounts, and is not control.
C. Providing and verifying paperwork does not amount to controlling the "means and manner" of performance.

12. Roth- The registration exemption only applies if the person is acting within the "scope" of his or her association with the member firm. The person cannot claim that he or she is always exempt from registration. The person must be under the supervision and control of the registered agent.

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[i] Servicesense.com, Inc. v. Chase, 337 B.R. 434, 435-37 (Bankr. D. Mass. 2006).
[ii] Id. at 436.
[iii] Id.
[iv] Id. at 435-36.
[v] Id. at 440-41.
[vi] Lawrence v. Richmond Group of Conn., L.L.C., 407 F.Supp.2d 385, 386 (D. Conn., 2005).
[vii] Id. at 388.
[viii] Id.
[ix] Id.
[x] Id.
[xi] Id.
[xii] Id.
[xiii] Id. at 390.

[xiv] SEC v. George, 426 F.3d 786, 788 (6th Cir. 2005).
[xv] Id.
[xvi] Id.
[xvii] Id. at 788-89.
[xviii] Id.
[xix] Id. at 788.
[xx] Id. at 797.
[xxi] Id.
[xxii] Id. at 786.
[xxiii] SEC v. Martino, 255 F.Supp.2d 268, 272 (S.D. N.Y. 2003).
[xxiv] Id. at 273.
[xxv] Id. at 272.
[xxvi] Id. at 272-75.
[xxvii] Id.
[xxviii] Id.
[xxix] Id. at 283.
[xxx] Id. at 284.
[xxxi] Id. at 270.
[xxxii] Couldock & Bohan Inc. v. Société Generale Sec. Corp., 93 F.Supp.2d 220, 229 (D. Conn. 2000).
[xxxiii] Id. at 224, 228-29.
[xxxiv] Id. at 228.
[xxxv] Id.
[xxxvi] Id. at 228-29.
[xxxvii] Id. at 230-31.
[xxxviii] SEC v. Randy, 38 F. Supp.2d 657, 668 (N.D. Ill 1999).
[xxxix] Id.
[xl] Id.
[xli] Id.
[xlii] Id.
[xliii] Id. at 662.
[xliv] Id. at 668.
[xlv] Id.
[xlvi] Id.
[xlvii] SEC v. Kenton Capital Ltd., 69 F.Supp2d 1, 7 (D.C. 1998).
[xlviii] Id. at 5-7.
[xlix] Id. at 13.
[l] Id. at 5-7.
[li] Id.
[lii] Id. at 6.

[liii] Id. at 5.
[liv] Id. at 13.
[lv] Id. at 5.
[lvi] Id. at 13.
[lvii] Id.
[lviii] SEC v. Deyon, 977 F. Supp 510, 514 (D. Me. 1997).
[lix] Id. at 515.
[lx] Id. at 519.
[lxi] Id. at 518.
[lxii] Id. at 514-15.
[lxiii] Id.
[lxiv] Id. at 514.
[lxv] Id. at 518.
[lxvi] SEC v. Nat'l. Exec. Planners Ltd., 503 F.Supp. 1066, 1071 (M.D.N.C. 1980).
[lxvii] Id. at 1073.
[lxviii] Id. at 1069.
[lxix] Id.
[lxx] Id. at 1073.
[lxxi] Id.
[lxxii] Id. at 1070.
[lxxiii] Id. at 1073.
[lxxiv] Ufitec, S.A. v. Carter, 20 Cal 3d 238, 571 P.2d 990, 992 (S.Ct Cal. 1977).
[lxxv] Id.
[lxxvi] Id.
[lxxvii] Id.
[lxxviii] Id.
[lxxix] Id.
[lxxx] Id. at 995.
[lxxxi] SEC v. Hansen, 1984 WL 2413 at *2 (S.D.N.Y. Apr. 6, 1984).
[lxxxii] Id.
[lxxxiii] Id.
[lxxxiv] Id. at 3.
[lxxxv] Id. at 2.
[lxxxvi] Id. at 11.
[lxxxvii] Id.
[lxxxviii] SEC v. Ridenour, 913 F.2d 515, 517 (8th Cir. 1990).
[lxxxix] Id. at 517.
[xc] Id.
[xci] Id.

[xcii] Id.
[xciii] Id.
[xciv] Torsiello Capital Partners L.L.C. v. Sunshine St. Holding Corp. http://burch.typepad.com/_/files/unregistered_broker_case_408_ny.PDF at **3, 9 (Sup. Ct. N.Y. April 1, 2008).
[xcv] Id. at 9.
[xcvi] Id. at 2-3.
[xcvii] Id. at 10.
[xcviii] Id.
[xcix] Id. at 9.
[c] Id.
[ci] Id. at 11.