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February 28, 2014

**Utah Division of Securities
Policy Position Regarding
M&A Brokers and Business Brokering**

In light of recent changes to the regulatory landscape, the Utah Division of Securities (“Division”) has revised its position on business brokering activities and the corresponding licensing requirements for those engaging in such activities.

Ultimately, the Division will seek to adopt a formal rule exempting a certain subset of business brokers, herein after referred to as M&A Brokers¹, from registration as either a broker-dealer or agent under the Utah Uniform Securities Act (“Act”); however, the Division will not begin drafting its rule until greater consensus is established among the states and the status of pending federal legislation on the matter is determined. In the interim, the Division will rely on federal guidelines from the Securities and Exchange Commission (“SEC”) in its recent No-Action Letter, *M&A Brokers* (“*M&A Brokers NAL*”).²

BACKGROUND

The Division became concerned with certain aspects of business brokering activities in or about 2009. The Division’s concerns involved instances whereby securities transactions were utilized to facilitate the sale or merger of a business and third-party business brokers and/or intermediaries received transaction-based compensation in connection with their role in effecting such transactions.

In such instances, the Division held the position that those securities transactions generally required the business broker or intermediary to license as a broker-dealer or agent under the Act. However, the Division found that many business brokers in the industry operated without seeking such licenses.

¹ The recent *M&A Brokers* No-Action Letter issued by the Securities and Exchange Commission on 31 January 2014 defines “M&A Broker” as: “a person engaged in the business of effecting securities transactions solely in connection with the transfer of ownership and control of a privately-held company through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the company, to a buyer that will actively operate the company or the business conducted with the assets of the company.”

² M&A Brokers, SEC No-Action Letter (January 31, 2014, revised February 4, 2014).

To address this concern, the Division issued an open letter regarding business brokering, dated 7 May 2009, to explain that engaging in business brokering activities may require licensing as a broker-dealer or agent. While not explicitly stated in that open letter, the Division held the position that it would not require business brokers and/or intermediaries to license as a broker dealer or agent so long as their business brokering was conducted in accordance with the SEC's *Country Business, Inc.* No-Action Letter ("*Country Business, Inc. NAL*").³

Beyond its primary concern surrounding the widespread unlicensed activity of business brokers and/or intermediaries, the Division also has ongoing concerns that small business owners may not have the appropriate legal and/or accounting guidance or expertise to: (1) determine whether the valuation of the securities performed by some business brokers is appropriate; (2) evaluate whether the compensation paid to the business broker is reasonable; and (3) decide whether the sale or merger through a securities transaction, as opposed to an asset sale, is in their best interest. This concern is heightened when the business broker, whose compensation is tied to the success of the transaction, is the sole source of guidance for the small business owner and/or representative of both parties in the transaction.

RECENT CHANGES

On 6 June 2013, the Small Business Mergers, Acquisitions, Sales and Brokerage Simplification Act of 2013 ("H.R. 2274") was introduced in the U.S. House of Representatives ("U.S. House"). H.R. 2274 amends Section 15(b) of the Exchange Act to provide an exemption from registration for M&A Brokers.⁴ H.R. 2274 passed the U.S. House on 14 January 2014 and is currently pending consideration before the U.S. Senate.

On 31 January 2014 (revised 4 February 2014), the SEC issued the aforementioned *M&A Brokers NAL*, that defined "M&A Brokers" (as recited in footnote ¹) and outlined the activities that could be conducted and transactions that could be effected without requiring registration with the SEC under Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act").

³ *Country Business, Inc.*, SEC No-Action Letter (November 8, 2006).

⁴ The definition of "M&A Broker" in H.R. 2274 differs from the definition in the SEC's *M&A Brokers NAL*. H.R. 2274 defines "M&A Broker" as: "A broker, and any person associated with a broker, engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of an eligible privately held company, regardless of whether the broker acts on behalf of a seller or buyer, through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the eligible privately held company, if the broker reasonably believes that—(I) upon consummation of the transaction, any person acquiring securities or assets of the eligible privately held company, acting alone or in concert, will control and, directly or indirectly, will be active in the management of the eligible privately held company or the business conducted with the assets of the eligible privately held company; and (II) if any person is offered securities in exchange for securities or assets of the eligible privately held company, such person will, prior to becoming legally bound to consummate the transaction, receive or have reasonable access to the most recent year-end balance sheet, income statement, statement of changes in financial position, and statement of owner's equity of the issuer of the securities offered in exchange, and, if the financial statement of the issuer are audited, the related report of the independent auditor, a balance sheet dated not more than 120 days before the date of the offer, and information pertaining to the management, business, results of operations for the period covered by the foregoing financial statements, and material loss contingencies of the issuer."

H.R. 2274 and the SEC's *M&A Brokers NAL* represent a significant departure from the SEC's 2006 *Country Business, Inc. NAL*. These changes have prompted the Division and other states' securities agencies to reconsider their respective positions on business brokering and the licensing requirements for M&A Brokers. Additionally, the North American Securities Administrators Association ("NASAA") has not weighed in on the matter and may consider drafting a model rule for states to exempt M&A Brokers in the future. However, any such NASAA model rule would likely follow the outcome of H.R. 2274.

INTERIM POSITION

Given the pending status of H.R. 2274, the Division will wait for a consensus to be established among the states, and perhaps for NASAA to issue a model rule, before the Division will seek to draft a formal rule exempting M&A Brokers from licensing requirements under the Act.

In the interim, the Division will follow the guidance set forth in the SEC's *M&A Brokers NAL* to determine whether licensing as a broker-dealer or agent is required for M&A Brokers or business brokers in the state of Utah.

It should be noted, however, that while this exemption would apply to the licensing requirements for M&A Brokers, any securities transactions involved in business brokering would still be subject to Corporate Finance regulations and the anti-fraud provisions of the Act.