TABB, INC.
TEXAS ASSOCIATION
OF BUSINESS BROKERS

October 19, 2009

4-599

Ms. Mary Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Securities Licensing/Registration Exemption for Main Street Business Brokers

Dear Ms. Schapiro:

Presently there is debate and confusion as to whether the activities of "main street business brokers" require a securities license or registration on a state and/or federal level to collect a fee for their services. "Main street business brokers" are those business brokers who market and facilitate the transfers of small businesses from one owner-operator to another owner-operator or to a qualified investor following the criteria stated in SEC's Private Letter Rulings described in numbered paragraph 1 below. The vast majority of these business transfers are asset sales. Main street business brokers provide an essential service to the small business community in the transfer of on-going businesses, which preserves jobs and the continuity of providing goods and services to consumers.

Because of this and because of the support the SEC and the courts have expressed with respect to the matter, the TABB, Inc. d/b/a the Texas Association of Business Brokers actively advocates for a codification of activities already deemed permissible by the SEC and many courts that would constitute a federal and state exemption for main street business brokers so that they may legally collect a fee relating to a sale of a business via securities without any sort of state or federal licensing or registration requirements.

There is considerable support from the U.S. Securities and Exchange Commission (the "SEC") and the courts which would lend itself to a codification of this statutory "exemption" we propose. That support is summed up as follows:

1. The SEC has already, on two occasions, with a consistent voice approved what activities main street business brokers may perform without the necessity of registration or licensing. Those activities are described in the Private Letter Rulings ("PLR's") issued by the SEC to International Business Exchange Corporation on December 12, 1986 and some twenty years later to Country Business, Inc. on November 8, 2006.

2. The reasoning that lead to the holding in Vero Group v. ISS Service System, et al providing that a finder/business broker does not need a license or registration to collect a brokerage fee recognized the difference between applying the "economic reality" and the "sale of business" doctrines to a securities fraud case versus applying those doctrines to a finder/brokerage case in which the sale was from and owner operator to an owner operator, rather than an investment of money in a common enterprise with profits to come solely from the efforts of others.

Effective November 2, 2009, amendments to NASD Rules 1022 and 1032 require certain individuals to pass the new Limited Representative – Investment Banking Qualification Examination (Series 79 Exam). This Series 79 Exam requirement does not apply to main street business brokers but specifically applies to individuals affiliated with FINRA member firms whose activities are limited to investment banking and principals who supervise such activities. However, the SEC's Division of Trading and Markets (the "Division") is presently considering a, Federal registration exemption and simplified system of regulation for merger and acquisition intermediaries. This consideration is based on the Alliance of Merger & Acquisition Advisors ("AM&AA") letter to the Division.

The most recent Proposed Model State Rules of M&A Brokers and Small Business Sales advocated by AM&AA advocates for both the following:

(i) a federal and state M&A Broker proposed rules for those who want to be able to provide services beyond those allowed in the IBEC and CBI PLR's, such as raising private equity capital and seeking to put investor groups together to buy businesses, and

(ii) a federal and state exemption from licensing or registration for main street business brokers who deal in small business sale transactions in accordance with the IBEC and CBI PLR's.

The exemption for main street business brokers who deal in small business sale transactions is crucial to the profession and the business owners they serve. The cost to obtain and comply with federal and state licensing or regulation would be prohibitive for main street business brokers who are selling restaurants, dry cleaners, and other small businesses which upon an occasion involves selling the stock of the business rather than just its assets. All of these businesses fall within the definition of a small business, as defined by the U.S. Department of Commerce and the Small Business Administration.

Industry studies reflect that there are approximately 130,000 business sale transactions per year in the U.S. of which only 4,000 transactions involve businesses valued at $1 million or more. Less than 15% of these transactions involve the sale of privately held securities. Furthermore, business brokers handle only about 35% to 40% of these transactions. Many of these transactions are handled directly between Buyers and Sellers, sometimes with the help of their accountants and attorneys. Business brokerage is a very small profession with less than 3,500 companies in the U.S. calling themselves business brokers. Litigation with business brokers for violations of public trust have been few and rarely get to the level of the federal court system. The cost to regulate or even register business brokers will far and away exceed any reasonable public benefit. Codification of an exemption for main street business brokers will clarify practices permitted by main street business brokers and would benefit the public.

In support of our position on this matter, enclosed is a summary of the PLR's and judicial rulings relating to the issue that has been compiled by the Texas Association of Business Brokers' General Counsel, John C. Willems, III. Mr. Willems' memo traces the support that the SEC and the courts have given to the statutory exemption we propose and summarizes the activities which main street business brokers may engage in order to qualify for this exemption.

As a member of the U.S. Securities and Exchange Commission, we hope that you will support the Texas Association of Business Brokers' position for a federal and state exemption to be codified adopting the parameters of the SEC's PLR's to IBEC and CBI relative to state and federal licensing or registration of main street business brokers.

Respectfully,
Tabb, Inc.

By:
John M. Miller, President

Enclosures

CC: Kathleen L. Casey
Elisse B. Walter
Luis A. Aquilar
Troy A. Paredes

JOHN C. WILLEMS, III
Attorney at Law
10440 N. Central Expressway
Suite 1400
Dallas, Texas 75231
Direct -214-360-1020
Fax-214-360-1010
Email: jwillems@dringer.com

MEMORANDUM

TO: Mike Miller, President, TABB, Inc.
CC: Keith Chapman, Immediate Past President, TABB, Inc., Dominick Caravella, President Houston Chapter, TABB, Inc., David Sweeten, President San Antonio Chapter, TABB, Inc., Clarence Griggs, President Austin Chapter, TABB, Inc., Ben Johnson, President DFW Chapter, TABB, Inc., Lucy Higgins, Secretary, TABB, Inc., Jeff Jones, Treasurer, TABB, Inc., and Eduardo Berdegue, Vice President, TABB, Inc.
FROM: John C. Willems, III, General Counsel, TABB, Inc.
DATE: August 11, 2009
RE: Legal Authorities for Securities Licensing Exemption Relative to Main Street Business Brokers

****

EXECUTIVE SUMMARY:

A codification of a federal exemption relative to any sort of licensing or registration of business brokers when handling the sale of a small closely held company is needed for the business brokers who handle those sales ("main street business brokers") via a stock or an equity transfer.

There is considerable support from the U.S. Securities and Exchange Commission (the "SEC") and the courts with respect to this proposition. That support is summed up as follows:

1. The SEC has already, on two occasions, with a consistent voice approved what activities main street business brokers may perform without the necessity of registration or licensing. Those activities are described in the Private Letter Rulings ("PLR's") issued by the SEC to International Business Exchange Corporation on December 12, 1986 and some twenty years later to Country Business, Inc. on November 8, 2006.

2. The reasoning that lead to the holding in Vero Group v. ISS Service System, et al[1] providing that a finder/business broker does not need a license or registration to collect a brokerage fee recognized the difference between applying the "economic reality" and the "sale of business" doctrines to a finder/brokerage case in which the sale was from and owner operator to an owner operator, as opposed to applying these doctrines to either an investment of money in a common enterprise with profits to come solely from the efforts of others or applying these doctrines to a securities fraud case.

[1] Vero Group v. ISS Service System, et al, 971 Fed 2d 1178 (1992).

Presently, there is debate and confusion as to whether the activities of main street business brokers require those brokers to have a securities license or registration on a state and federal level. Because of this and because of the support the SEC and the courts have expressed with respect to the matter as referenced above, the Texas Association of Business Brokers, Inc. ("TABB") should actively advocate for a codification of activities already deemed permissible by the SEC and many courts that would constitute a federal exemption for main street business brokers so that they may collect a fee relating to a sale of a business via a securities without any sort of state or federal licensing or registration requirements.

BACKGROUND:

Since at least 1946, main street business brokers were considered by the courts to be exempt from any sort securities licensing or registration in order to be able to collect their fees based on the "economic reality test" as espoused by the United States Supreme Court in the case of S.E.C. v. W.J. Howey Co.[2] The theory of the "economic reality test" is that when 100% of the stock of a company is transferred the federal securities laws do not apply. The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.[3] Following the holding in Howey is United Housing Foundation v. Forman[4] and in that case the court similarly reasoned, "The test for distinguishing a transaction in securities, within the meaning of the regulatory acts, from other commercial dealings is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."[5]

The Texas Court of Appeals in San Antonio also followed the Howey holding in Star Supply Company v. Jones [6] which cites a long line of cases on both the state and federal level which applied the "economic reality test" reasoning that when the goal of the purchaser is not an investment which relies on the efforts of others, but is a desire to consume, use and acquire in its entirety the thing being purchased, the securities laws do not apply.[7] Star Supply Company v. Jones was decided in 1984.

However, in 1985 the United States Supreme Court in Landreth Timber Company v. Landreth said, "Because the Courts of Appeal are divided over the applicability of the federal securities laws when a business is sold by the transfer of 100% of its stock, we granted certiorari."[8] In its final determination in Landreth the Supreme Court said, "In sum we conclude that the stock at issue here is a "security" within the definition of the Acts, and that the sale of business doctrine does not apply."[9] The court in Landreth reasoned, "Instruments that bear both the name and all

---

[2] S.E.C. v. W.J. Howey Co. 328 U.S. 293, 66 S.Ct. 1100, 1104, 90 L.Ed. 1244, 1251 (1946).

[3] Id at 301.

[4] *United Housing Foundation v. Forman*, 421 U.S. 837, 847, 95 S.Ct. 2051, 2058, 44 L.Ed2d 621, 629 (1975).

[5] Howey, Supra at 301.

[6] Star Supply Company v. Jones, 665 SW2d 194 (1984).

[7] Star, Supra, at 196, Citing S.E.C. v. W.J. Howey Co., 328 U.S. 293, 301, 66S.Ct. 1100, 1104, 90 L.Ed. 1244, 1251 (1946) and the test being reiterated in United Housing foundation v. Forman, 421 U.S. 837, 847, 95 S.Ct. 2051, 2058, 44 L.Ed.2d 621, 629 (1975).

[8] Landreth Timber Company v. Landreth, 105 S.Ct. 2297, 2301 (1985).

[9] Id at 2307

the usual characteristics of stock seem to us to be the clearest case for coverage by the plain language of the definition."[10]

Some state courts that have followed Landreth have done so because they adopt the reasoning of the United States Supreme Court in Landreth. See Fong v. Oh, 172 P.3d 499, 508-09 (Haw. 2007); Banton v. Hackney, 557 So.2d 807, 824 (Ala. 1989); Cohen v. William Goldberg & Co., Inc., 423 S.E.2d 231, 232-33 (Ga. 1992). Some courts have done so without explicitly agreeing with the Supreme Court's reasoning, but because the language of the 1933 and 1934 Acts is substantially similar to the wording of the particular state securities statute. Barnes v. Sunderman, 453 N.W.2d 793, 796 (N.D. 1990); Carver v. Blanford, 342 S.E.2d 406, 407 (S.C. 1986). These courts apply the "stock characterization test" from Landreth.

Some state courts that have not followed Landreth have done so because they have reasoned that their state legislatures have intended the state securities statues to cover sales in the securities market, not commercial transactions when a closely held corporation is sold. See White v. Solomon, 732 P.2d 1389, 1391 (N.M. Ct. App. 1986); Doherty v. Kahn, 682 N.E.2d 163, 169-70 (Ill. App. Ct. 1997); Anderson v. Heck, 554 So.2d 695, 700 (La. Ct. App. 1989). These states continue to apply the principle the United States Supreme Court applied in Forman, that "form should be disregarded for substance and the emphasis should be on economic reality." People v. Figueroa, 715 P.2d 680, 694 n.26 (Cal. 1986) (quoting 715 P.2d 680, 694 n.26 (Cal. 1986) (quoting Tcherepnin, 389 U.S. at 336). As such, these states apply the "sale of business" doctrine so that state securities laws do not apply to transactions in which 100% of the stock of a closely held corporation is transferred.

QUESTIONS PRESENTED:

1. Are the "economic reality" and "sale of business" doctrines dead or not and should they be?
2. Do main street business brokers need to be licensed or registered with the SEC and/or the various states in which they operate or not?

DISCUSSION:

In direct response to the holdings in both Star Supply and Landreth and in order to get comfort that a main street business broker was not required to be licensed or registered, International Business Exchange Corporation ("IBEC"), a Texas corporation, wrote the SEC with a fact scenario that described not only their business activities, but also the activities of many main street business brokers both in Texas and throughout the country. Seemingly contrary to the holding in Landreth, and in the face of the fact that IBEC clearly identified themselves as acting as a broker for a seller who ultimately sold their company through the sale of stock, the SEC issued the PLR attached as Exhibit "A." In this PLR the SEC tacitly confirmed that under the fact pattern laid out IBEC could collect a fee and was not required to be registered or licensed to collect its fees in a securities sale of a small business.[11] It described activities that the SEC deemed permissible by a main street business broker vitiating any obligation or requirement by that broker to be licensed or registered by the SEC.

---

[10] Id, at 2305.

[11] The tacit confirmation is inferred by reason of the SEC asserting that under the facts presented, no enforcement action would be recommended. See the SEC IBEC PLR, page 3.

For years, brokers in Texas and around the country have used the fact scenarios described in the IBEC PLR in conducting their business and believed that in doing so, they were also not required to be licensed or registered by the SEC.[12] Brokers in Texas routinely have a copy of the IBEC PLR in their files to share with sellers of businesses, buyers of businesses and the lawyers on behalf of those sellers and buyers.

However, because the national debate has heated up regarding this issue of registration or licensing regarding business brokers,[13] lawyers on behalf of Country Business, Inc. ("CBI") (some twenty year post the IBEC request for a PLR) sent a written description of the activities of the business brokers working at CBI to the SEC and requested another PLR relating to the activities of main street business brokers. Once again, seemingly contrary to the holding in Landreth, and despite the fact that the lawyers on behalf of CBI clearly identified that CBI brokers occasionally acted as brokers for a seller who ultimately sold their company through the sale of stock, the SEC issued the PLR attached as Exhibit "B."

The CBI PLR described activities that the SEC deemed permissible by a business broker without that broker risking an SEC enforcement action and seemingly vitiating any obligation or requirement by that broker to be licensed or registered by the SEC.[14] The activities deemed permissible by the SEC in the CBI PLR were virtually identical to the activities deemed permissible by the SEC in the IBEC PLR although the CBI PLR was issued some twenty years after the IBEC PLR.

The "economic reality" and "sale of business" doctrines are not dead and they should not be because the basic underlying facts in the Landreth case are distinguishable from the facts in the Star Supply case. The holdings in Landreth and Star Supply can be both justified and reconciled with each other. This justification and reconciliation is best set out by the Fifth Circuit Court of Appeals in Vero Group v. ISS Service System, et al[15] saying the two cases (Star Supply and Landreth) were factually different. The court in the Vero case said,

> "Given those facts, we are not persuaded that the ruling in Landreth would cause [*1188] the Texas Supreme Court to change the rule of Star Supply and Ellsworth if faced with the finder's fee issue before us. As an anti-fraud case involving wide broker listing, Landreth is factually distinguishable from both Ellsworth and Star Supply. The relevant agreement in the Landreth case was the stock purchase agreement between the buying and selling principals; the relevant agreements at issue in Star Supply and Ellsworth. [**29] as in the instant case, were those between a finder and one of the parties to the eventual stock transaction. Landreth did not implicate the issue of whether a buyer or seller of a business could properly refuse to pay for the services of an unregistered finder merely because the buying and selling parties elect to employ a stock sale to effect the transfer of the business. Rather, Landreth involved whether under the 1933 Act a

[12] Understanding that the PLR's (i) did not carry the weight of law, (ii) were relegated to the facts presented in the letters upon which they were based and (iii) applied only to the parties to whom the PLR's were directed.

[13] See "The American Bar Association Report and Recommendations of the Task Force on Private Placement Broker – Dealers, June 7, 2005."

[14] In the CBI PLR the SEC asserted that under the facts presented, no enforcement action would be recommended. See the SEC CBI PLR, page 1.

[15] Vero Group v. ISS Service System, et al, 971 Fed2d 1178 (1992).

> security had to be registered under federal law to be sold without implicating the anti-fraud provision of the Act."[16]

The Vero court was saying that Landreth was a securities fraud case and Vero was a finder fee (business broker's right to a fee) case. The Vero court reasoned that the securities laws should apply to fraud cases, but when it comes to a broker attempting to collect a commission when the sale is from and owner operator to an owner operator, the "economic reality test" should apply.[17] (It is worth noting that the Vero court's use of the term "finder" to describe the actions of Vero was not the correct description of what Vero did. Vero was in fact performing brokerage functions, as beyond the introduction of the buyer to ISS-USA the Vero court noted, "Vero met with the representatives of ISS-USA and ADT. Vero worked with the parties to complete ISS-USA's acquisition of ADT Maintenance from ADT."[18] Clearly the actions of Vero in working with the parties went beyond a mere introduction as is the job of a true "finder.")

Landreth did not strike down the "economic reality" or the "sale of business" doctrine in a business brokerage case. It was not a case where a business broker was attempting to collect a fee. Landreth was decided correctly in that it applied the anti-fraud provisions of the Securities Acts to a seller of a security who made false representations as to future facts and attempted to use the "economic reality" or the "sale of business" doctrines as a defense saying that the sale was not a securities sale.[19] The Landreth Court correctly held the "sale of business" doctrine did not apply in that case.[20] It did not say that the "sale of business" doctrine was dead. The Court also did not say that the "sale of business" doctrine could not be applied to business brokerage cases.

The SEC and the Court in Vero have correctly applied and interpreted Landreth. They correctly have recognized that a sale of a business from an owner operator to an owner operator with limited broker involvement is not the type of transaction that the securities laws were enacted to regulate, because the traditional definition of a security, "...involve(d) an investment of money in a common enterprise with profits to come solely from the efforts of others."[21]

Further, the SEC has correctly dealt with a key troublesome issue that is present in applying the "sale of business" doctrine. That issue is the application of the "sale of business" doctrine applying any time there is a change of control[22] in the business as then the question becomes, "When does the change of control occur, at a sale of more than 50% of the equity, some greater percentage, or some lesser percentage?" In dealing with this issue, the SEC has relegated the "no action" criterion according to the IBEC and the CBI PLR's to a sale of 100% of the stock or equity interests in a company. This requirement negates the argument concerning the slippery slope in relation to where you draw the line to deem a control change.

In sum, the "economic reality" or the "sale of business" doctrines are not dead and they should not be dead when it comes to main street business brokers handling the sale of 100% of the stock or equity interests in a business under the parameters of the SEC's logic behind the PLR's issued to IBEC and CBI, and the reasoning of the Court in the Vero case and the other cases whose

---

16 Id, at 1187.
17 Star, Supra, at 196.
18 Id, at [*1181]
19 Id, at [*1181]
20 Id, at [*1181]
21 Howey, Supra at 301
22 Id at 2307

holdings run contrary to the holding in Landreth. To clear up the dispute in the courts, an explicit statutory exemption itemizing just what can be done by main street business brokers is needed.

MAIN STREET BUSINESS BROKERS ARE THE PROVERBIAL "SQUARE PEG IN THE ROUND HOLE":

In addition to the SEC's logic behind the PLR's issued to IBEC and CBI, and the reasoning of the Court in the Vero case and the other cases whose holdings run contrary to the holding in Landreth, the actual activities of main street business brokers arguably do not fall within the constraints of some if not most of the statutes that seek to govern the activities of the main street business broker. For example, a Rule promulgated pursuant to the Texas Securities Act by the Texas Securities Board requires that business brokers must register in order to legally handle intrastate securities transactions in Texas. The statutory basis for the Rule is contained in the Texas Securities Act, Art. 581-12(A). Article 581-12(A) states as follows:

> "Except as provided in Section 5 of this Act, no person, firm, corporation or dealer shall, directly or through agents, offer for sale, sell or make a sale of any securities in this state without first being registered as in this Act provided. No agent shall, in behalf of any dealer, sell, offer for sale, or make sale of any securities within the state unless registered as an agent for that particular registered dealer under the provisions of this Act."

In performing duties on behalf of a seller of a business, the main street business broker does not typically perform any of the functions described in the Texas Securities Act Art. 581-12(A). A main street business broker who operates his or her business in accordance with the guidelines set out in either of the IBEC PLR or the CBI PLR does not "offer" securities for sale. The main street business broker always offers the "business" for sale, as he or she doesn't know if the buyer will offer to buy the assets of the business or the equity interests of the business.

A business broker who operates his or her business in accordance with the guidelines set out in either of the IBEC PLR or the CBI PLR is not the one who "sells" the securities. A business broker who operates his or her business in accordance with the guidelines set out in either of the IBEC PLR or the CBI PLR does not actually "make the sale" of any securities. The Seller and the seller's counsel handle the actual sale.

In contrast, a typical Series 7 licensed securities broker has a customer who calls him and asks him to sell their MicroSoft or GE stock. That securities broker has the client or customer sign a power of attorney, the broker then takes possession of the stock, offers the stock for sale by placing it on the appropriate exchange, sells the stock to a purchaser attracted by the offer and actually, with the power of attorney given him or her by the seller, makes the sale taking possession of the sales proceeds, transferring ownership of the stock from the seller to the buyer and distributing the proceeds to the customer, minus the securities broker's commission. A main street business broker does none of these activities.

This example highlights the fact that the main street business broker and what a typical business broker does on behalf of a seller of a business is not even close to what a Series 7 licensed securities broker does on behalf of their clients. The main street business broker in the regulatory scheme of the Texas Securities Act is the proverbial "square peg in a round hole."

The statutory basis for registration of a business broker under the Texas Securities Act is challengeable based on what the main street business broker actually does on behalf of his client as compared to the language as contained in the Texas Securities Act Art. 581-12(A) giving the

Texas Securities Board the power to regulate the activities described. The main street business broker does not, "...offer for sale, sell or make a sale of any securities..."[23]

The argument against the Texas Securities Board being statutorily authorized to make a Rule requiring business brokers to register lies in the actual activities of a particular business broker. If, in fact, a business broker conducts his business without performing any of the acts as contained in the Texas Securities Act, Art. 581-12(A), then there exists is no basis for regulation of that business broker's activities by the Texas Securities Board and its Rules relating to that particular business broker do not apply to that business broker.

Another example can be gleaned from the Utah Uniform Securities Act. Section 61-1-13(1)(c) of the Utah Uniform Securities Act states:

> "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for the person's own account . . ."

A main street business broker who operates his or her business in accordance with the guidelines set out in either of the IBEC PLR or the CBI PLR does not engage "...in the business of effecting transactions in securities for the account of others or for the person's own account." The parameters of both the IBEC PLR and the CBI PLR require that the business broker not offer for sale or solicit the purchase of a security, not advise that a security be sold and leave that advice and decision to the parties and their advisors, not have a material role in the negotiations after the decision is made to sell securities and will merely facilitate the transmittal of information or documents between the buyer and seller, or their advisors and certainly never actually "effects" the transaction in securities. The parties and their lawyers do that.

The main street business broker who operates his or her business in accordance with the guidelines set out in either of the IBEC PLR or the CBI PLR does not fall within the definition of a "Broker-dealer" under the Utah Uniform Securities Act. The analogies relative to other state's securities laws go on and on.

Main street business brokers do occasionally become involved in a transaction which results in the sale of securities. When a business transfers pursuant to a sale of securities, the business broker is not in on the decision to sell securities. The business broker does not prepare or complete the transfer documents. The business broker is tangentially involved in the transaction to say the most. The transactions are not traditional securities transactions. This is true because the transactions do not involve an investment "...of money in a common enterprise with profits to come solely from the efforts of others."[24] The main street business broker is the proverbial square peg in a round hole caught in a morass of regulations that were not meant to govern their activities as long as those activities are conducted in accordance with the IBEC PLR and the CBI PLR issued by the SEC and the other parameters described in the Vero case and other cases of Vero's ilk.

Effective November 2, 2009, amendments to NASD Rules 1022 and 1032 require certain individuals to pass the new Limited Representative – Investment Banking Qualification Examination (Series 79 Exam). This Series 79 Exam requirement does not apply to main street business brokers but specifically applies to individuals affiliated with FINRA member firms whose activities are limited to investment banking and principals who supervise such activities.

---

[23] Texas Securities Act Art. 581-12(A)

[24] Howey, Supra at 301.

However, the SEC's Division of Trading and Markets (the "Division") is presently considering a, "... Federal registration exemption and simplified system of regulation for merger and acquisition intermediaries."[25] This consideration is based on the Alliance of Merger & Acquisition Advisors ("AM&AA") letter to the Division.[26]

The most recent Proposed Model State Rules of M&A Brokers and Small Business Sales advocated by AM&AA advocates for both (i) a federal and state M&A Broker proposed rules and (ii) an exemption or exclusion from registration for business brokers who deal in small business sale transactions.[27] The exclusion or exemption for the business brokers who deal in small business sale transactions (i) should be based on the PLR's and legal arguments contained in this memo, and (ii) is crucial to the main street business broker and the business owners they serve.

CONCLUSION AND RECOMMENDATION:

Under narrowly defined parameters, both the SEC and the courts have supported the concept that a main street business broker does not need a license or registration to be able to collect a fee relating to the sale of a business that is concluded via the sale of securities. A federal exemption needs to be codified adopting those narrow parameters as set out in the SEC's PLR's to IBEC and CBI and incorporating the reasoning in Vero, Star Supply and other cases relative to state and federal licensing or registration of main street business brokers.

I have attached a summary of the exemption parameters as Exhibit "C." These parameters were taken from both the IBEC and CBI PLR's, and the relevant case law. The parameters should be offered up to the SEC and the other regulatory authorities as the basis for the proposed statutory exemption.

---

[25] Federal Register, Vol 74, No. 75, Pg. 18269, footnote 7.

[26] Id, pg footnote 4 and footnote 7

[27] See:
http://www.amaaonline.com/files/Proposed SEC Rules for M&A Brokers and Small Business Sales 3-20-08 Final.pdf, pages 1 and 3

EXHIBIT "A"

Private Letter Ruling issued by the SEC to

International Business Exchange Corporation on December 12, 1986

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
MARKET REGULATION

December 12, 1986

Mr. Bobby J. Johns
Vice President
International Business
Exchange Corporation
Post Office Box 15046
Austin, Texas 78761

Dear Mr. Johns:

This is in response to your letter of November 3, 1986 on behalf of the International Business Exchange Corporation ("IBEC") in which you request that the Division of Market Regulation not recommend enforcement action to the Commission if IBEC does not register as a broker-dealer in accordance with Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"). Based upon your letter and our conversations, I understand the facts to be as follows.

IBEC is a business broker headquartered in Texas and licensed as a real estate broker in those states in which it operates. IBEC's activities consist mainly of selling businesses that are going concerns and which may be organized as closely held corporations, proprietorships or partnerships. IBEC accepts listings of businesses for the purpose of transferring ownership and control from the seller to the purchaser. While ownership is transferred primarily by a sale of a business's assets, where the business is organized as a corporation, transfer of ownership may also be effected by a sale of all the outstanding equity securities of the business. In return for assisting in the sale of a business, IBEC receives a commission that is based upon the owner's accepted selling price, regardless of the means used to effect the transaction. IBEC's commission is payable in cash and does not include an equity interest in the business being sold.

You state that only the assets of the businesses represented by IBEC are listed for sale. Moreover, IBEC does not advertise or otherwise promote the sale of securities. Any

decision to effect the transfer of a business by means of a securities sale is made solely by the purchaser and seller without the recommendation of IBEC. Once a decision is made by the two parties to effect the transaction by a sale of securities, IBEC does not negotiate the terms of the sale, nor offer advice to either the purchaser or seller about the value of the securities.

IBEC's role in negotiations between the buyer and seller is limited to transmitting documents between the two parties. All information about a business being offered for sale by IBEC is supplied by the seller. IBEC apprises potential purchasers that it has not verified this information and makes no representations about the accuracy of the information provided. In addition, IBEC does not handle funds on behalf of either the purchaser or seller, or have the authority to act on their behalf in order to effect the transaction.

All sales are made to a single purchaser or group of purchasers formed without the assistance of IBEC. Moreover, IBEC does not assist purchasers in obtaining financing for the transaction. IBEC may, however, at the request of the purchaser or seller, provide a list of potential lenders, such as banking and venture capital firms, that have expressed an interest in extending credit.

You have indicated that IBEC's concern about the application of the broker-dealer registration requirements has been heightened by the recent United States Supreme Court decision in Landreth Timber Co. v. Landreth, 105 S. Ct. 2297 (1985) ("Landreth"). In Landreth, the Supreme Court held that the sale of a business effected by transferring ownership of one-hundred percent of a company's stock constituted a securities transaction entitled to protection of the federal securities laws. 1/ The ruling in the Landreth case ended the controversy among the federal circuit courts over the validity of the so-called "sale of business doctrine." 2/

1/ See also, Gould v. Ruefenacht, 105 S. Ct. 2308 (1985) (holding that the sale of fifty percent of a company's stock involved the sale of securities for purposes of the federal securities laws).

2/ See, e.g., Easly, Recent Developments in the Sale of Business Doctrine, 39 Bus. Law. 929 (1984) (discussing the "sale of business doctrine" prior to the Supreme Court's decison in Landreth).

Section 3(a)(4) of the Exchange Act generally defines a broker as any person who engages in the business of effecting transactions in securities for the account of others. Unless an exemption is available, Section 15(a) of the Exchange Act requires brokers to register with the Commission in accordance with the provisions of Section 15(b). This office has traditionally indicated that individuals who do nothing more than bring merger and acquisition-minded persons or entities together and who do not participate in negotiating the sale of securities, nor share in any profits realized, are probably not brokers and would not be required to register as such. In contrast, we have also said that a professional who brings together potential buyers and sellers and advises the parties on questions of value, plays an integral role in negotiating the transaction, or provides other services designed to facilitate the transaction, may be deemed to be a broker. 3/

Based upon your representations, the Division would not recommend enforcement action to the Commission if IBEC and its employees do not register with the Commission as broker-dealers in accordance with Section 15(b) of the Exchange Act. In taking this position, we note that: (1) IBEC has a limited role in negotiations between the purchaser and seller; (2) the businesses represented by IBEC are going concerns and not "shell" organizations; (3) only assets are advertised or otherwise offered for sale by IBEC; (4) transactions effected by means of securities convey all of a business's equity securities to a single purchaser or group of purchasers formed without the assistance of IBEC; (5) IBEC does not advise the two parties whether to issue securities or assess the value of any securities sold; (6) IBEC's compensation does not vary according to the form of conveyance (i.e., securities rather than assets); and (7) IBEC does not assist purchasers to obtain financing, except to the extent described elsewhere in this letter.

You should be aware that this is a staff position regarding enforcement action only with respect to Section 15(a) of the Exchange Act. You are reminded of the continued

---

3/ See, e.g., Letter to Ruth Quigley dated June 14, 1973, [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶79,474; Letter to May-Pac Management Co. dated December 20, 1973, [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶79,679; Letter to Wesco Equity Funding dated July 9, 1985.

applicability of the anti-fraud provisions of the federal securities laws to transactions in which securities are used to transfer ownership of a business. In addition, you should also understand that this no-action position does not express a legal opinion about the application of the federal securities and is based solely upon the representations you have made. Accordingly, any different facts of conditions might result in a different response.

You have agreed to waive the provisions of the Commission's rule concerning publication of no-action and interpretive letters and other written communications (17 CFR §200.81), which provides for the public availability of written communications, together with any written response thereto, 30 days after the date of such written response. Your letter dated November 3, 1986 and this letter shall immediately be placed in the Commission's public files.

Very truly yours,

Edward L. Pittman
Attorney
Office of Chief Counsel

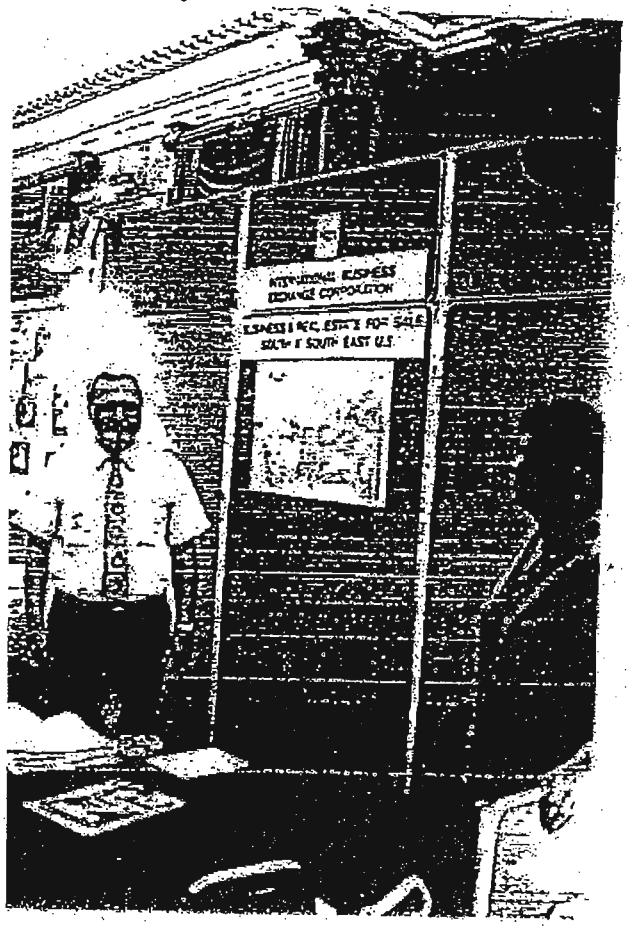
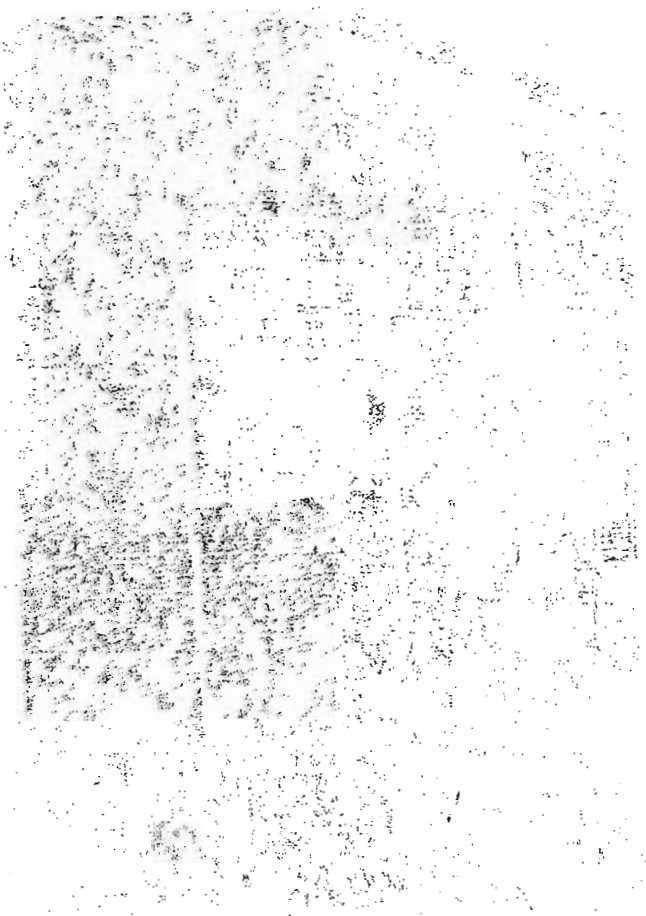


EXHIBIT "B"

Private Letter Ruling issued by the SEC to

Country Business, Inc. on November 8, 2006



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
MARKET REGULATION

November 8, 2006

Craig McCrohon, Esq.
Holland & Knight LLP
131 South Dearborn Street
Chicago, IL 60603

Re: Country Business, Inc. Request for No-Action Relief

Dear Mr. McCrohon:

In your letter dated November 8, 2006, on behalf of Country Business, Inc. ("CBI"), you request assurance that the staff of the Division of Market Regulation ("Staff") will not recommend enforcement action to the Commission under Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act") if CBI engages in the activities described in your letter without registering as a broker-dealer under Section 15(b) of the Exchange Act.

Based on the facts and representations set forth in your letter, the Staff will not recommend enforcement action to the Commission under Section 15(a) of the Exchange Act if CBI engages in the activities you describe without registering as a broker-dealer. We note in particular your representations that: (1) if a decision is made to effect the transaction by a sale of securities, CBI will have a limited role in negotiations between the seller and potential purchasers or their representatives as described in your letter and will not have the power to bind either party in the transaction; (2) the business represented by CBI is a going concern and not a "shell" organization; (3) the Selling Company satisfies the size standards for a "small business" pursuant to the Small Business Size Regulations issued by the U.S. Small Business Administration; (4) only assets will be advertised or otherwise offered for sale by CBI; (5) if the transaction is effected by means of securities, it will be a conveyance of all of the business's equity securities to a single purchaser or group of purchasers formed without the assistance of CBI; (6) CBI will not advise the two 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); (7) CBI's compensation will be determined prior to the decision on how to effect the sale of the business, will be a fixed fee, hourly fee, a commission, or a combination thereof, that is based upon the consideration received by the seller, regardless of the means used to effect the transaction and will not vary according to the form of conveyance (i.e., securities rather than assets); (8) CBI's compensation will be received in the amounts and at the times as described in your letter; and (9) CBI will not assist

purchasers with obtaining financing, other than providing uncompensated introductions to third-party lenders or help with completing the paperwork associated with loan applications.

This position is based on the facts presented and the representations you have made, and any different facts and circumstances may require a different response. Furthermore, this response expresses the Staff's position on enforcement action only and does not purport to express any legal conclusions on the question presented. The Staff expresses no view with respect to any other questions that the proposed activities may raise, including the applicability of any other federal or state laws or self-regulatory organization rules.

Sincerely,

Brian A. Bussey
Assistant Chief Counsel

EXHIBIT "C"
SECURITIES TRANSFER EXEMPTION PARAMETERS
FOR MAIN STREET BUSINESS BROKERS

In accordance with the parameters set out by the U.S. Securities and Exchange Commission's Private Letter Rulings issued to International Business Exchange Corporation on December 12, 1986 and to Country Business, Inc. on November 8, 2006, under the reasoning in Vero Group v. ISS Service System, et al, 971 Fed 2d 1178 (1992) and the cases in line with Vero and Star Supply Company v. Jones, 665 SW2d 194 (1984), the following acts should be codified to form the basis of a federal exemption relative to securities licensing or registration of main street business brokers when those business brokers are involved in the sale of a business that results in a securities transaction:

The permitted activities of the business broker under the exemption are proposed as follows:

1. In marketing a business, the business broker will only advertise to potential buyers that the "business" is for sale.
2. The business broker will not advise either the buyer or seller that the transaction be completed via a sale or purchase of securities.
3. If the decision is made to conclude the sale of the business via a sale of securities, it will be made by the buyer and seller or their advisors without the business broker's advice.
4. After the time, if any, the decision is made that the sale transaction will be a securities sale the business broker will then have a limited role in the negotiations between or among the parties and will merely facilitate the transmittal of information or documents between the buyer and seller, or their advisors.
5. In no event will the business broker have the authority to make binding agreements on behalf of any party to a securities transaction.
6. The business broker will not assess the value of any security or equity interest to be sold, but may assess the total value of the assets or the business to be sold as a going concern.
7. The business broker will not be involved in the formation or set up of the buyer or the buyer group.
8. The business broker will not assist the buyer in obtaining financing.
9. However, the business broker may provide uncompensated introductions to lending sources that the buyer may consider for the transaction. The business broker also may help in completing the paperwork associated with loan applications for the buyer in order to assist in completing the transaction.
10. The compensation to be paid to the business broker will not change regardless of the manner in which the sale is concluded (whether asset sale or the sale of securities).
11. In no event will the business broker accept any equity securities as compensation if the sale results in the sale of the equity in the business (a securities transaction).

12. The business broker will always advise potential buyers that the business broker does not and will not verify the information given to the business broker about the business.
13. The business broker will also advise potential buyers that the business broker does not make any representation about the accuracy of the information provided regarding any aspect of the business.
14. The business sold will not be a "shell" entity.
15. The business broker will not handle the transfer of funds from a buyer to a seller, but may accept earnest money from a buyer for deposit with a third party escrow agent.
16. The business broker will always be subject to the anti-fraud provisions of all securities acts of the United States.
17. The size of the entity being sold would not matter as long as the sale was from an owner operator to an owner operator or to a "Qualified Investor" as that term is defined in the Securities Acts.