

# BIEF

Business Intermediary  
Education Foundation



## **NAVIGATING FEDERAL AND STATE-LEVEL M&A BROKER REGULATIONS**

Panelists: Shane Hansen, John Zayac, and Mike Ertel



BIEF  
c/o IBG Business  
4643 S. Ulster Street,  
Suite 1295  
Denver, CO 80237

<https://biefoundation.net/>

### **Mission**

Our mission is to create and enable activities to uplift the profession through, but not limited to: INFORMATION • AWARENESS • RESEARCH • OUTREACH • ANALYSIS • EXCHANGE • UNDERSTANDING • COOPERATION • EDUCATION

### **Objectives**

First, Develop cooperation, education, and interchange among worldwide peers and with related professions

In Addition, Advise, educate, and persuade business buyers, sellers, and their advisors about the value and wisdom in employing a professional business broker or intermediary when selling, buying, or transferring ownership of a business.

Moreover, Cause development and delivery of education and programs to enhance competencies and success throughout the business brokerage, mergers and acquisitions profession or its clientele.

Also, Enable study and research into topics of value to the profession and its markets. Finally, Establish perpetual self-funding to enable and sustain BIEF's vision and mission.

# Today's panelists . . .

• **J. Michael Ertel**



• **Shane B. Hansen**



• **John Zayac**



# Today's panelists . . .

**J. Michael Ertel, Co-Chair  
BIEF Campaign for Clarity**

**Transworld M&A Advisors**  
Managing Director  
<https://www.transworldma.com/mikeertel/>

400 Carillon Parkway,  
Suite 110  
Saint Petersburg, FL 33716

[mertel@transworldma.com](mailto:mertel@transworldma.com)  
T 727.231.5376

**Shane B. Hansen, Legal Counsel  
BIEF Campaign for Clarity**

**Warner Norcross + Judd LLP**  
Of Counsel  
<https://www.wnj.com/people/shane-b-hansen/>

150 Ottawa Avenue NW,  
Suite 1500  
Grand Rapids, MI 49503

[shansen@wnj.com](mailto:shansen@wnj.com)  
T 616.752.2145

**John Zayac, Chairperson  
Business Intermediary  
Education Foundation**

**International Business Group, LLC**  
Managing Partner, Founder & Principal  
– Colorado  
<https://ibgbusiness.com/the-company/our-team/>

4643 S. Ulster Street,  
Suite 1295  
Denver, CO 80237

[zayac@ibgbusiness.com](mailto:zayac@ibgbusiness.com)  
T 303.758.4000

# About today's presentation . . .

- ❑ This presentation has been provided for educational purposes only
- ❑ It does not constitute legal advice – “facts and circumstances matter”
- ❑ Application of securities laws and regulation is complex and nuanced
- ❑ State-level laws, rules, and judicial interpretations vary widely
- ❑ Multiple states may have jurisdiction in the same deal
- ❑ Consult your own attorney for fact-specific guidance

# Today's key take-aways . . .

- **Federal securities law** now exempts “**M&A brokers**” (as defined) . . .
  - From **federal** broker-dealer **registration** [and thereby from FINRA membership]
  - In **qualifying** M&A “**securities**” transactions [e.g., stock deals and equity rollovers]
  - All other securities regulation of a “**broker**” still applies [e.g., anti-fraud prohibitions]
- **State-level and D.C.** securities laws similarly regulate M&A brokers . . .
  - **22 states** have adopted M&A-specific “**M&A brokers**” registration exemptive relief
  - Some states have **conditional, generally applicable “institutional”** exemptions
  - Some states have **no** exemptions – **state-specific advocacy** is necessary
  - NASAA **updated its model** M&A broker exemption to align with the federal exemption
- **17 states** regulate **business brokerage** under **real estate licensing laws**
- **No exemption = risk of no compensation** [commonly, no expense recovery]

# M&A Broker Exemption's key points . . .

- Scope – covers very broad range of corporate control-type transactions:
  - Target - “**eligible privately held company**” must meet these criteria:
    - No SEC-registered securities (or required to be registered)
    - Alternative target company **size caps**:
      - **\$250 million** in “book” gross revenues; **and/or**
      - **\$25 million** in “book” EBITDA
    - Metrics apply to **target’s fiscal year** ended **prior to engagement**
    - Metrics apply to target’s **actual financial statements**
    - Must be an **operating company**, not a “shell company”
      - Cannot be a SPAC (“special purpose acquisition company”)
      - New inactive subsidiaries for **triangular sub mergers** are **OK**

# M&A Broker Exemption's key points . . .

- “**M&A broker**” (as defined) must “**reasonably believe**” **three (3) things** –  
(e.g., bake these into your client-signed engagement letter)
  - Buyer will at closing acquire and hold a **controlling interest**  
(Presumption of control at **25% or more ownership**)
  - Buyer will be **active in post-closing management** (directly or indirectly)  
(e.g., board member, executive officer, approval of company’s budget)
  - **If** seller is **offered buyer’s securities** (e.g., equity rollovers), **buyer** must **provide seller** at/prior to **offer** of its securities –
    - Buyer’s last FY financial statements
    - Buyer’s current (w/in 120 days) balance sheet
    - Buyer’s MD&A of its last FY’s performance
    - Disclosure of material loss contingencies



# M&A Broker Exemption's key points . . .

- **Conditions** to the exemption – “**M&AB don'ts**”
  - **Cannot have custody**, possession or control of \$\$\$
    - Use third-party escrow services for earnest money
    - Reminder – only applies in M&A securities transactions
  - **Cannot be engaged in a public offering** of securities
    - A public company can be a buyer, but not in a registered public offering of its securities
  - **Cannot provide deal financing** (directly/indirectly)  
(E.g., PE/VC firms funding their own deals cannot rely on the exemption to take a deal fee)
  - Cannot be involved in a **sale to passive buyers**
  - Cannot **form or facilitate forming group of buyers**
    - SEC concerns with creating a private fund of passive buyers
    - SEC concerns with perceived PE firm/fund abuses (e.g., taking a deal fee)
  - **Cannot bind a party** (e.g., no power of attorney)

# M&A Broker Exemption's key points . . .

- **Disqualifications** – M&AB cannot rely on the exemption if:
  - The M&A brokerage firm, owners, or management are –
    - **Barred** from the securities industry
    - **Suspended** from securities registration
    - State-level exemptions may include additional disqualification types (e.g., state licensing violations)

# State-level M&AB exemptions (23 states) ...

## Lawmaking

1. Florida (2017) (2025 legislative update pending)

## Rulemaking

2. Alaska (2019)
3. Arkansas (2020)
4. Colorado (2017)
5. Illinois (2016)
6. Iowa (2018)
7. Michigan (2019)
8. Mississippi (2018)
9. Montana (2020)
10. Nevada (2023)
11. Oklahoma (2020)
12. South Dakota (2019)
13. Texas (2016)
14. Vermont (2016)

## Agency Order, Interpretation, or No-Action Letter

15. Georgia (2015)
16. Maryland (2017)
17. Nebraska (2019)
18. New Jersey (2024)
19. Pennsylvania (2016)
20. South Carolina (2014)
21. Tennessee (2017)
22. Utah (2014)

## Other Exemptions (fact-dependent; not limited to M&A)

23. Washington (see, RWC Sections 21.20.040 and 21.20.320; and WAC 460-44A-050 and 460-44A-506)

# How you can make a difference . . .

- Work with and through your **state and regional associations**
  - Identify key state **economic development advocates**
  - Identify key state economic development **agencies**
  - Identify **key state legislators**
  - **Coordinate state-level efforts**
- **State-level uniformity** is critically important for **interstate deals**
  - North American Securities Administrators Association (NASAA) is the professional association of state (and provincial) securities regulators
  - **In 2024 NASAA's updated its 2014 model M&AB rule to align with the federal M&A broker registration exemption**
- Contribute to BIEF (<https://biefoundation.net/contribute-bief/>)

**Today . . .**

**LIVE QUESTIONS**

**Use the chat box**

**Tomorrow . . .**

**IBBA and M&A Source Websites  
and Routing Your Questions  
Through the IBBA/M&AS**

# Available resources . . .

- IBBA website:

<https://www.ibba.org/resource-center/legal-updates/>

- M&A Source website:

<https://masource.org/resources/legal-updates/>

- BIEF website:

<https://biefoundation.net/>