

BIEF

Business Intermediary
Education Foundation



M&A Broker Registration Exemption: State-Level Progress and Next Steps for Intermediaries

Panelists: Shane Hansen and John Zayac



BIEF

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<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 . . .

- Shane B. Hansen
- John Zayac



In memorium . . .

J. Michael Ertel
(May 22, 1947 — May 19, 2025)
Campaign for Clarity, Co-Chair



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 regulate M&A brokers too . . .
 - 23 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 or expense recovery

Today's Focus . . .

- Quick summary of the federal registration exemption's conditions
 - No federal preemption of state securities laws – state-by-state project
 - Minimizing differences between federal and state exemptions
 - Multiple states' securities laws may apply in each deal - jurisdiction
 - Differences do exist because of timing and different regulatory processes
- Minimizing differences requires state-level coordination
- Role of state and regional M&A associations in coordination

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

- Federal Scope – covers 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)
 - Alternate 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”)
 - Tax-driven triangular subsidiary 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 letters)
 1. Buyer will at closing acquire and hold a controlling interest
(A presumption of control arises at 25% or more ownership)
 2. Buyer will be active in post-closing management (directly or indirectly)
(e.g., board member, executive officer, approval of company's budget)
 3. If a seller is offered the buyer's securities (e.g., equity rollovers), the buyer must provide seller at/prior to offer of its securities –
 - Buyer's last FY financial statements (need not be audited)
 - 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 \$\$\$ in securities deals
 - Use third-party escrow services for earnest money
 - Cannot be engaged in a public offering of securities
 - A public company can be a buyer, just not in a registered public offering
 - 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 protecting passive buyers in a private fund
 - SEC concerns with perceived PE firm/fund abuses (e.g., “double-dipping” with deal fees)
 - 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 M&AB exemptions may include more disqualifications (e.g., state licensing violations)

State-level M&AB exemptions (24 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. Indiana (**new**-2025)
17. Maryland (2017)
18. Nebraska (2019)
19. New Jersey (2024)
20. Pennsylvania (2016)
21. South Carolina (2014)
22. Tennessee (2017)
23. Utah (2014)

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

24. 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 securities regulators
 - In 2024 NASAA's updated its 2014 model M&AB rule to align with the final federal M&A broker registration exemption
- Contribute to BIEF (<https://biefoundation.net/contribute-bief/>)

State-by-State Regulatory Processes . . .

- State-level rulemaking, lawmaking, or administrative orders
 - 24 states have adopted M&A broker exemptive relief – format varies
 - 26 states and D.C. yet to go
- BIEF's 2024 regulatory update letter sent to all states and D.C.
 - Advised state regulators of the new federal statutory exemption
 - Provided NASAA's updated M&A Broker model rule
 - Advocated adoption of NASAA's 2024 updated model rule
 - BIEF's advocacy letters are available to use in your state's advocacy
 - BIEF's state-level adoptions "tracking chart" is also available

State-level Regulatory Processes Vary . . .

- State-level rulemaking or administrative orders
 - Most state securities regulators need a “political push” to prioritize
 - Governor’s office or a state-wide economic development agency
 - Influential legislative leadership
 - Small business and economic development advocacy groups
 - State and regional chambers of commerce
 - Other “small business allies”
 - Some state securities regulators need more –
 - Reasons for their reticence for rulemaking or administrative orders varies
 - Lawmaking may be necessary (e.g., Florida accomplished this)
 - Preserving and growing state small biz jobs is a universal theme

State and Regional M&A Associations . . .

- IBBA and M&A Source
- AM&AA
- Business Brokerage Press - Industry Associations & Networks
(<https://businessbrokeragepress.com/industry-resources/industry-associations-networks/>)
- Association for Corporate Growth (<https://www.acg.org/chapters>)

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/>