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Re: Second Request for Comments Regarding a Proposed NASAA Model Rule Exempting Certain Merger and Acquisition Brokers from Registration Pursuant to State Securities Acts.

Comments Requested

- 1. A commenter has suggested that the Proposed Rule should be clearer in its prohibition of a Merger and Acquisition Broker facilitating a capital raise for an issuer through Rule 506(c) offering which is independent from an M&A Transaction. NASAA intends for the Proposed Rule to prohibit a Merger and Acquisition Broker from participating in an issuer capital raise using a Regulation D, Rule 506 offering for something other than an M&A Transaction. In your opinion, does the Proposed Rule need to be further clarified as to this point? If so, what clarification would be useful?**

Most M&A transactions involve the sale of securities and all transactions involving the sale of stock need to be supervised by a broker dealer to protect the public good. We are adamantly opposed to any proposed rule that would deregulate a securities transaction and put Company owners and investors at undue risk. There is no reason to create a rule that removes protections under current securities laws while offering little to no economic benefit to Company owners or investors. Moreover, M&A activity is at a seven year high.

- 2. A commenter has raised the issue of whether a Merger and Acquisition Broker would be prohibited under the Proposed Rule from advertising an “eligible privately held company” for**

sale. Should there be clarification in the Proposed Rule about advertising? Should the Proposed Rule specifically regulate what the advertisement should include, such as a description of the business, its general location, and a price range? Should the Proposed Rule speak to the mode of communication for the advertisement (oral, written, electronic)?

While we do favor clarity in advertising standards for advertising “eligible privately held companies” for sale, the difficulty would be in enforcing or monitoring specific advertising standards for unregistered M&A Brokers. FINRA has extensive experience and bodies of rules that provide guidance on advertising. Without FINRA or SEC registration, the burden would fall on the States, and in States already facing a serious budget crisis, such as in California, this would leave such standards unenforced or even monitored.

- 3. Some commenters have suggested that NASAA should remove the size cap restriction for an M&A Transaction from the Proposed Rule. Specifically, should paragraphs (E)(ii)(1)(bb) and (F) be deleted from the Proposed Rule? What would be the risks and benefits of doing so? Should the proposed Rule include optional language to allow states to limit the size of an M&A Transaction based on local industry standards and needs?**

The size cap restrictions in The Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2015 (H.R. 686) are opposed by SIFMA, Industry leaders, law Professors and Consumer Protection groups as being too high and bad public policy. If State size cap restrictions conflict with Federal, a conflict of laws issue would arise. The size limitations would in effect be rendered completely useless unless monitored or regulated by the States. We proposed that if an exemption was to be enacted, the cap should be for Companies with revenues of \$5 million or less. This \$5 million is consistent with Federal definitions of what a small business is, transactions involving companies this small are less complex and pose the least amount of transaction risk, and it would have the least amount of destructive impact on those that are licensed and have been following securities rules since the beginning.

- 4. Certain commenters have suggested that it may be premature for NASAA to adopt the Proposed Rule at this juncture because there is not federal legislation which has been adopted on this topic. If you believe that it is premature for NASAA to adopt the Proposed Rule at this juncture, what is the basis for your position?**

We believe it is premature for NASAA to adopt the Proposed Rule as it is simply bad Public Policy to create laws that circumvent the 1934 Act which was put in place to protect the public. This is consistent with testimony made by many groups to Congress. Also, FINRA is creating a limited broker dealer registration for M&A Brokers that would have limited rule sets.

- 5. By contrast, other commenters have suggested that it is not premature for NASAA to adopt a model rule, but that the Proposed Rule should be more in line with the terms and conditions enumerated by the SEC Letter. Commenters pointed to the fact that the SEC Letter allows for a Merger and Acquisition Broker to advertise a company for sale and to represent both buyer and seller in a transaction. However, the SEC Letter limits a Merger and Acquisition Broker’s ability to arrange for financing amongst a group of buyers. The Proposed Rule is silent on all of these issues. If NASAA were to adopt a model rule based on the SEC Letter, what are the**

risks and benefits of doing so?

We believe it is premature for NASAA to adopt the Proposed Rule as it is simply bad Public Policy to create laws that circumvent the 1934 Act which was put in place to protect the public. This is consistent with testimony made by many groups to Congress. The SEC No Action Letter is not a law and specific conditions need to be met in order for the No Action Letter to be applicable. Even then the SEC has the ability to pursue action if wrong doing is committed. It is also important to note that the SEC No Action letters can be modified or changed over time. We are opposed to legislating the SEC No Action letter because it is too early to see what kind of impact the No Action Letter has on Fraud or other violations and to legislate now is premature and will be burdensome to amend over time. Also, FINRA is creating a limited broker dealer registration for M&A Brokers that would have limited rule sets.

6. Commenters suggest that there is a need to ensure that a Merger and Acquisition Broker is bound by federal anti-money laundering law specifically. While NASAA believes the Proposed Rule does bind a Merger and Acquisition Broker to all federal and state anti-money laundering laws when facilitating an M&A Transaction, should NASAA include additional language to the Proposed Rule for clarification purposes?

While we believe a Merger and Acquisition Broker is already bound by federal anti-money laundering laws when facilitating an M&A Transaction, the issue is not whether the Transaction would be subject to anti-money laundering laws, rather, the issue is who will monitor and enforce those laws? Without FINRA registration or SEC registration, monitoring and enforcing M&A Transactions done by unregistered brokers for compliance with Anti-Money Laundering or Bad Actor provision will be the responsibility of the States. Also, FINRA is creating a limited broker dealer registration for M&A Brokers that would have limited rule sets.

We are opposed to the creation of a Model Rule by NASAA. The SEC Act of 1934 was in its essence created to PROTECT THE INVESTING PUBLIC. FINRA has been working diligently over the past several years in trying to clean up a space that has been in desperate need of attention. FINRA came up with the Series 79 which is a dedicated license for investment banking professionals that are engaged in assisting companies that are selling their business or raising capital. FINRA is also finalizing a limited broker dealer registration for M&A Brokers that would have limited rule sets. This space is really starting to come together with approximately 5,000 licensed investment bankers already and many industry professionals and clients are seeing the value in becoming affiliated and working with licensed persons.

There are licenses required for almost anything you do such as cutting hair, driving your car, selling real estate, and many other consumer related services. As you know, many other financial advisors, who are often sole providers of advice on a family's financial assets are registered agents of broker dealers. The quality of that advice has a direct impact on that family's ability to retire and/or survive. Business owners typically have in excess of 90% of their assets tied up in their businesses. Why would we want to allow unregistered individuals who have no ethical oversight or continuing education requirements to advise business owners on their single most important financial asset? It is anticipated that the largest volume of M&A

middle market activity in American History is looming on the horizon and they are proposing to remove the protections that help to ensure owners are being advised by qualified, vetted, monitored and licensed professionals assisting them with the transfer of their most precious financial asset. The model rule would result in anyone making representations or promises without *accountability, transparency, supervision* or following *best practices*.

Accountability – When you are licensed as a business broker (investment banker) you are accountable to the broker dealer and the regulators. Licensed investment bankers know that their reputation is always subject to investigation and review and that any serious violations could result in public disclosures and sanctions from the industry. Broker dealers also make an effort as part of their new recruiting process to identify red flags and only associate with those individuals that don't have a history of criminal or regulatory issues. Broker dealers perform background investigations when bringing on new issuers and investors. Again these are basic due diligence items that help with making sure all parties are accountable. Without any regulatory mandate for these types of procedures to be performed, the public could be subject to predators and those with criminal intent representing them in the largest business transaction of their life.

Transparency – The broker dealer provides the Federal, State, SRO and other regulatory bodies a looking glass into the deals, people and other information around the transactions a broker dealer is involved with, as well as, the procedures that have been performed to ensure compliance. Also, FINRA provides Broker Check which is a free service at www.finra.org that allows the public to verify broker dealer and agent licenses, background and regulatory history. This tool empowers the public and it also provides them with assurances that the individuals offering them services are licensed, have no history of compliance issues and will be held to a high standard of ethical and industry practices. The proposed legislation will remove the public's ability to access vital information on potential intermediaries and result in the "Caveat Emptor" issues alluded to earlier in this document.

Supervision – The broker dealer and its principals are required to supervise the activities of their licensed bankers. Supervision begins with bringing on the right people and reviewing the backgrounds of the people that join the broker dealer. Then performing background checks on customers and investors on the deals we are helping facilitate. Supervision takes many forms and it is ongoing. Supervision includes back ground checks, reviewing email communications, reviewing marketing materials before they are provided to the investment public, comparing banker names, issuer names and investor names against OFAC, FINCEN and other databases to ensure we comply with our AML procedures and the patriot act. Without the current rules unlicensed bankers will have free range to act in any form they like which will include only serving their interest and taking no responsibility to ensure the best interest of their client. I'm not aware of any unlicensed banker that routinely performs back ground checks or takes steps to comply with the Patriot Act.

Best Practices – There are best business and compliance procedures that broker dealers are required to follow which neatly fit into a middle market investment banking deal process. It is a low cost and simple way for regulation compliance as long as the process is followed. The deal process includes background checks, review of marketing materials, due diligence, site visits,

AML procedures, Customer Identification and more. Without registration, individuals will only follow best practices at their discretion leading to the aforementioned fraud and competence issues. Again, FINRA over the past few years has developed the Series 79 process that makes it simple for unlicensed persons to become licensed at a reasonable cost while maintaining high competence standards through testing or experience requirements.

Unlicensed brokers who don't want to undergo the scrutiny that the licensing process requires could have criminal or regulatory issues, lack the resources to pay the required fees to become licensed (\$1, 700+/-) or may not possess the necessary skill set to pass the 5 hour exam created by Investment Bankers to measure a candidate's capacity to provide basic services. The "Baby Boomers" are rapidly reaching retirement age, many of which own businesses, who will seek liquidity through the sale of their business. We are looking at the largest volume of M&A activity in U.S. history. This is not the time to deregulate such an important industry but, a time to keep our laws in place to protect the investing public and ensure the people that are representing them are licensed and are bound by a code of ethics and professional standards.

The reality is that the hundreds of broker dealers that service this space are well equipped and are ready to serve capital markets and M&A and capital raising activities in the \$5MM to \$250MM gross revenues range. These are not small companies and are in desperate need of protection to ensure that licensed professionals are in place to serve them. I don't know of any broker dealers that are working on "Main Street" deals, which are those small companies with annual revenues under \$5MM. These could be gas stations, doctor offices, coffee shops, or other small franchises which are less complicated and typically exempted asset sales. If there were to be an exemption then it really should be in this space. Companies with annual revenues \$5MM to \$250MM are not small businesses and persons involved in the sales of securities for these companies should be licensed in order to protect the investing public.

We provide these comments to point out the risks to the public in the model rule as currently proposed.

Sincerely,



Dante Fichera
President



Houston Goddard
General Counsel