U.S. SECURITIES AND EXHANGE COMMISSION
ADVISORY COMMITTEE ON SMALL AND EMERGING BUSINESSES

June 3, 2015
Washington, D.C.

"NOTABLE BY THEIR ABSENCE: FINDERS AND OTHER FINANCIAL INTERMEDIARIES IN SMALL BUSINESS CAPITAL FORMATION"

Gregory C. Yadley *
Shumaker, Loop & Kendrick, LLP
Tampa, Florida

Background

Small businesses are often regarded as the catalyst for economic growth in the United States. Small businesses account for the creation of two-thirds of all new jobs, and are the incubators of innovation.[1] The majority of new jobs in the U.S. are from companies less than five years old.[2] Raising capital is a never-ending imperative for small businesses at every turn: to explore new ideas, to exploit a new development, to expand the scope of research, to move from concept to prototype to marketable product, for manufacturing, distribution and marketing. At some point, financial institution financing and capital market funding provide the monetary resources for the growth of the business – but not at the beginning and, often, not for a great many years. In the interim, funding is provided by private money – initially from friends and family, then from a wider circle of acquaintances, later, perhaps, from angel investors and, ultimately, venture capitalists and private equity groups. Angel investors, for example, provide approximately 90% of outside equity raised by start-up companies, and are virtually the only source of seed funding. In 2013, angels invested $25 billion in 71,000 companies.[3]

Early stage capital is raised exclusively through offerings that qualify for exemption under the registration provisions of the Securities Act of 1933 and the "blue sky" laws of the various states. The SEC's Regulation D, and particularly Rule 506 thereunder, is the Holy Grail, providing two paths for companies to raise unlimited amounts of money with a minimum of

---

* Mr. Yadley is a partner and chair of the corporate practice group in the Tampa, Florida, office of Shumaker, Loop & Kendrick LLP. He is an adjunct professor at the University of Florida College of Law and past chair of the American Bar Association Middle Market and Small Business Committee and The Florida Bar Business Law Section. He serves as a member of the U.S. Securities and Exchange Commission Advisory Committee on Small and Emerging Businesses. The views expressed in this article are those of the author. They do not necessarily reflect the views of the Advisory Committee or the staff or members of the Securities and Exchange Commission.

[1] President Barack Obama, Proclamation, National Small Business Week, 2014 (May 9, 2014) ("Small businesses represent an ideal at the heart of our Nation's promise – that with ingenuity and hard work, anyone can build a better life. They are also the lifeblood of our economy, employing half of our country's workforce and creating nearly two out of every three new American jobs."

[2] Marianne Hudson, Executive Director, Angel Capital Association; Presentation to SEC Advisory Committee on Small and Emerging Companies, Washington, DC (December 17, 2014).

[3] *Ibid.*

filings, mandated disclosure and other regulatory burdens.[4] Rule 506(b) exempts offerings from registration where "private" sales are limited to accredited investors and up to 35 non-accredited investors. In 2011, the estimated amount of capital raised in Regulation D offerings (overwhelmingly under the Rule 506 exemption) was more than $1 trillion, about the same as was raised in that year in public offerings.[5] In the 12 month period, September 23, 2013-September 22, 2014, there were almost 15,000 new Regulation D offerings, nearly all under the Rule 506 exemption.[6] Beginning in late 2013, with the amendments to Regulation D mandated by the "JOBS Act," new SEC Rule 506(c) exempts offerings from registration in "public" sales to accredited investors where the issuer has taken reasonable steps to verify such accredited status.[7] Significantly, only 13% of Regulation D offerings between 2009 and 2012 reported using a financial intermediary, such as a broker-dealer or finder. [8] There are several explanations as to why this is the case. However, for most start-up and early stage businesses, the primary reasons are the lack of interest from registered broker-dealers and the danger of using unregistered firms that might identify and solicit potential investors for these businesses.

Regulation of Broker-Dealers

Federal law and the law of the individual states prohibit a person from *engaging in the business of effecting transactions in securities* without a license. This means the person engaged in such a business (a securities broker or dealer) must be licensed and a member of the Financial Industry Regulatory Authority ("FINRA"), or a licensed representative of a FINRA member. Generally, any person who accepts "transaction based compensation," *i.e.*, commissions, for bringing capital to a third party securities issuer, must be so registered or licensed. [9] There is an exception for a person who merely introduces a potential purchaser to an issuer and accepts a "finder's fee" regardless of whether or not a sale of securities results. However, it is the position of the Securities and Exchange Commission ("SEC"), the North American Securities Administrators Association ("NASAA") and most state securities law administrators ("State

[4] 17 CFR 230.506. The SEC adopted Regulation D in 1982 following its evaluation of the impact of its rules on the ability of small businesses to raise capital. *See*, Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales, Release No. 33-6389 (Mar. 8, 1982) [47 FR 11251 (Mar. 16, 1982)]. Over the years, the SEC has revised various provisions of Regulation D in order to address, among other things, specific concerns relating to facilitating capital-raising as well as abuses that have arisen under the regulation. *See,* e.g., Additional Small Business Initiatives, Release No. 33-6996 (Apr. 28, 1993) [58 FR 26509 (May 4, 1993)] and Revision of Rule 504 of Regulation D, the "Seed Capital" Exemption, Release No. 33-7644 (Feb. 25, 1999) [64 FR 11090 (Mar. 8, 1999)].

[5] Vlad Ivanov and Scott Bauguess, Capital Raising in the U.S.: *The Significance of Unregistered Offerings Using the Regulation D Exemption*, report prepared for SEC Division of Risk Strategy and Financial Innovation, Washington DC (February 2012)

[6] Rachita Gullapalli, SEC Division of Economic and Risk Analysis; Presentation to SEC Advisory Committee on Small and Emerging Companies, Washington, DC (December 17, 2014). The data indicates that almost 99% of the funds were raised in Rule 506 offerings, more than 70% of which were undertaken by non-fund issuers (operating companies and financial companies).

[7] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, sec. 201(a), 126 Stat. 306, 313 (Apr. 5, 2012).

[8] *Capital Raising in the U.S., An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009-2012*, available on the SEC's website at www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf

[9] See, *e.g.* e-Media, LLC, SEC No-Action Letter (Dec. 14, 2001), in which the Staff found significant that neither e-Media nor its personnel would receive compensation other than "a flat transmission fee and that such fee w[ould] not be made contingent upon the outcome or completion of any securities transaction, upon the size of the offering, or upon the number of prospective investors accessing the [services]."

Administrators") that a person who accepts a fee for introduction of capital more than once is probably "engaged in the business of selling securities for compensation" and required to be registered as, or licensed and affiliated with, a broker-dealer. The Jumpstart Our Business Startups Act (the "JOBS Act") in 2012 included a very limited exception from broker registration for intermediaries assisting in securities offerings exempt under Rule 506 of Regulation D. However, to qualify for this exception, the intermediary may not receive any compensation in connection with a purchase or sale of the securities. [10]

<u>The Underlying Issues</u>

Without the assistance of third parties to introduce potential funding sources, it is unlikely that many small businesses would be successful in raising early stage capital. Funding of start-up and new companies is often sought in amounts of $100,000 or less, and rarely more than $5 million. Accordingly, these offerings are not of interest to many professional investors such as venture capital or private equity funds. In fact, most of this capital is supplied by angel investors. Locating angels, particularly outside of the two coasts and money centers, is particularly difficult for small companies. [11]

Fully licensed broker-dealers are similarly not inclined to assist in micro and small offerings. The risks involved in undertaking a small transaction are often similar to those of a large one, without a commensurate upside. The legal costs are often comparable to a larger transaction because of the lack of sophistication and internal recordkeeping and control systems of smaller issuers and the amount of work that must be done to prepare a private placement memorandum competently. The issuer's financial and other information is often not as complete or accurate and almost never audited by independent certified public accountants. Smaller issuers often lack the expertise and experience to adequately deal with external issues, including securities law compliance.

The current broker-dealer registration system, and especially the FINRA membership application process, is disproportionately complex for someone acting only as a "finder." The ongoing regulatory requirements – appropriate for a full-service broker-dealer, or one that engages in market making, over-the-counter trading for customers, proprietary trading, holding customer funds or securities, making margin loans, and the like – are similarly overwhelming for a finder or smaller intermediary.[12]

---

[10] Pub. L. No. 112-106 (2012), § 201(c)(2).

[11] Based on information from a member survey, the Angel Capital Association has presented data showing that angel capital is not available to the same extent throughout the country. Presentation by Marianne Hudson, Executive Director, Angel Capital Association, to the SEC Advisory Committee on Small and Emerging Companies, Washington, DC (December 17, 2014).

[12] In a recent letter to FINRA, the ABA Business Law Section commented on the burdens and substantial costs of initial broker-dealer registration and on-going compliance costs. The letter stated that initial legal, accounting and compliance-related costs often exceed $150,000 and on-going annual compliance-related costs could be in the range of $75,00-$100,000. Further, the comment letter noted that applying for and obtaining FINRA membership takes a minimum of six months (without taking into consideration the time necessary to ready the initial application for submission) and frequently longer. Comment Letter dated May 21, 2014, to FINRA re FINRA Regulatory Notice 14-09, Request for Comment on Proposed Rules for Limited Corporate Financing Brokers.

In many cases, finders, their client businesses, and sometimes even sometimes their attorneys, do not realize that they may be operating in violation of securities laws. In fact, many of these individuals and firms are unlicensed securities brokers whose fee contracts are unenforceable, whose financing transactions may be subject to rescission, and whose activities are illegal. [13] Unfortunately, in many other cases, persons acting as finders represent "the dark side" of the securities business: purveyors of fraudulent shell corporations; front-end fee con artists; purported Regulation S specialists who send stock off-shore and wait to dump it back into the U.S. through unscrupulous brokerage firms or representatives who are receiving under-the-table payments for promoting stocks and micro-cap manipulators.

Often, even when a small issuer utilizes the services of a finder, funding never materializes for the small business. Even if it does, dealing with unscrupulous finders and other unregistered intermediaries present significant problems for the issuer. They can taint an offering by creating the basis for rescission rights, raise enforcement concerns, make fraudulent representations and engage in general solicitation which disqualifies the offering for exemption from registration.[14]

2005 ABA Task Force Report

The May 2005 edition of The Business Lawyer published the *Report and Recommendation of the Task Force on Private Placement Broker-Dealers*. [15] The Task Force was formed by the Business Law Section of the American Bar Association in 1999 with the mission to address the disconnect between the various laws and regulations applicable to securities brokerage activities, and the methods and practices actually in daily use by which the vast majority of capital is raised to fund early stage businesses in the United States. The Report characterized the landscape as a "vast and pervasive 'gray market' of brokerage activity" that creates significant problems for the unlicensed brokers, the businesses which rely upon them for funding, attorneys and other professionals advising both the brokers and businesses, and, importantly, the federal and state regulators charged with the obligation to enforce laws and regulations that were – and continue to be – out of step with current business practices.

The thrust of the ABA Task Force Report and its Recommendation was for the SEC, FINRA (then, the NASD) and State Administrators to work to establish a simplified system for registration of private placement brokers ("PPBs"), that recognized their engagement in only very limited activities. The two primary goals of the Task Force recommendations were to

[13] Section 29(b) of the Securities Exchange Act provides that contracts made in violation of any provision of the Act or rule promulgated thereunder are "void." A private right of action for rescission has been recognized under this statute. See, *e.g.*, Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Torsiello Capital Partners v. Sunshine State Holding Corporation, N.Y. Slip Opinion 30979(U), Supreme Court, New York, County, Docket No. 0600397/2006 (April 1, 2008).

[14] The "private placement" exemption from registration of many states prohibits the payment of commissions or other compensation for the sale of the issuer's securities to persons required to be registered as broker-dealers but are not so registered. See, *e.g.*, Fl. Stat. § 517.061(11)(a).

[15] Task Force on Private Placement Broker-Dealers, ABA Section of Business Law, Report and Recommendations of the Task Force on Private Placement Broker-Dealers, 60 Bus. Lawyer 959-1028 (May 2005), available at http://www.sec.gov/info/smallbus/2009gbforum/abareport062005.pdf . The Task Force was comprised of representatives from the Committees on Small Business, Federal Regulation of Securities, Negotiated Acquisitions, and State Regulation of Securities.

facilitate capital formation by small businesses and to reduce as much as possible the illegal activities of unregistered finders. As part of the proposed new regime:

- Sales could only be made to "accredited investors," and only in limited amounts
- Sales could only be made in private placements, not public offerings
- Prior "bad boy" activities would disqualify a person from acting as a finder
- Full written disclosure of the finder's compensation would be required
- Finders would be exempt from the definitions of "broker" and "dealer" and permitted to share fees with broker-dealers
- Coordinated Federal and state regulation would focus on the above requirements and appropriate investor protections.

SEC Advisory Committee and Small Business Forum Support

On the heels of the Task Force Report, an SEC advisory committee in 2006 strongly endorsed the Task Force recommendation to seek better ways to oversee the largely-invisible world of private placement finders and at the same time to facilitate capital formation by small businesses. The SEC Advisory Committee on Smaller Public Companies urged the SEC to "[s]pearhead a multi-agency effort to create a streamlined NASD registration process for finders, M&A advisors and institutional private placement practitioners."[16]

Each year, the SEC hosts a Congressionally-mandated Government-Business Forum on Small Business Capital Formation ("Small Business Forum").[17] A major purpose of the Small Business Forum is to provide a platform to highlight perceived unnecessary impediments to small business capital formation and address whether they can be eliminated or reduced. Each forum seeks to develop recommendations for government and private action to improve the environment for small business capital formation, consistent with other public policy goals, including investor protection. Forum participants from as far back as the late 1990s have asserted that the SEC's twin objectives of enhancing small business capital formation and protecting investors can be met by bringing more unregulated or ineffectively-regulated activity into an appropriate regulatory environment that emphasizes disclosure and education.

Final Reports of the Small Business Forum since 2006 have urged the Commission to follow the recommendations of its own Advisory Committee on Smaller Public Companies. For example, the 2009 Small Business Forum Report stated that, "As recommended by its own Advisory Committee on Smaller Public Companies, and recommended by the SEC Government-Business Form's 2006, 2007 and 2008 Final Reports, the Commission should adopt rules as recommended" by the ABA Task Force in 2005.[18] Specifically, the 2009 recommendations included that the Commission:

---

[16] See Recommendation IV.P.6 of the Final Report of the SEC Advisory Committee on Smaller Public Companies (April 23, 2006); https://www.sec.gov/info/smallbus/acspc.shtml.

[17] The Forum has assembled annually since 1982, as mandated by the Small Business Investment Incentive Act of 1980. Participants in the Forum typically have included small business executives, venture capitalists, government officials, trade association representatives, lawyers, accountants, academics and small business advocates. Final Report of 32d Annual SEC Government-Business Forum on Small Business Capital Formation, U.S. Securities and Exchange Commission, Washington, DC (November 21, 2013).

[18] Final Report of 2009 Forum (May 2010); https://www.sec.gov/info/smallbus/sbforumreps.htm

"allow "private placement brokers" to raise capital through private placements of issuers' securities offered solely to "accredited investors" in amounts per issuer of up to 10% of the investor's net worth (*excluding* his or her primary residence), with full written disclosure of the broker's compensation and any relationship that would require disclosure under Item 404 of Regulation S-K, in aggregate amounts of up to $20 million per issuer."

The Final Report of the 2011 Small Business Forum included, as its second priority recommendation, that:

"the SEC should adopt a financial intermediary exemption that would remove from the scope of federal broker registration requirements persons who operate in a limited capacity to assist smaller issuers in raising private capital subject to investor protection safeguards." [19]

The foregoing recommendations demonstrate the general consensus that there is a problem that needs to be addressed. The definition of "broker" is subject to ambiguities and led to significant non-compliance, as well as an impediment to capital formation for smaller companies. The full-blown process of FINRA membership has been a deterrent to meaningful oversight of intermediaries in this area. FINRA and the SEC acknowledge the importance of the issue and have, at various times, met with representatives of the ABA and other interested persons.[20] NASAA established a working group to address the problem, but there has been no real regulatory traction. [21]

The Final Report of the most recent Forum, held on November 20, 2014, includes the same recommendations as the 2013 Forum, specifically, that the SEC:

"Join with NASAA and FINRA in the effort to implement the basic principles of the American Bar Association Task Force on Private Placement Brokers. To achieve this goal, [the Commission should] join NASAA and FINRA in developing a timeframe for quarterly or other regular meetings – with specified benchmarks – until a mutually agreeable regime of finder registration and regulation is achieved."[22]

Recent efforts of the Task Force have included discussions with the SEC and FINRA and NASAA and drafting proposed regulations under the Securities Exchange Act for consideration by the SEC's Division of Market Regulation. The theory is to impose limited regulatory requirements on PPBs who limit their activities to specified parameters, do not hold customer

[19] Final Report of 2011 Forum (March 2012); https://www.sec.gov/info/smallbus/sbforumreps.htm
[20] In November 2008, then-Director of the SEC Division of Trading and Markets Erik Sirri informed a meeting of the ABA Committee on Federal Regulation of Securities, Subcommittee on Market Regulation, that he had given the Staff a "green light" to proceed with its work and to present a proposal to the Commission.
[21] On September 10, 2010, Faith Colish, Martin Hewitt and Gregory C. Yadley, three ABA Task Force chairs acting in their individual capacities, wrote to Joseph Borg, of the NASAA Board of Directors, State Administrators, emphasizing the need to address this important regulatory issue. They noted that action in doing so presented a timely opportunity to assist the national economic recovery and the creation of new jobs in the small business sector.
[22] Final Report of 2014 Forum (May 2015) https://www.sec.gov/info/smallbus/sbforumreps.htm

funds or securities and deal only with accredited investors. The point would be to bring these PPBs under the tent but not impose such stringent regulations as would make it financially untenable for them to register. The Task Force believes that PPBs should be required to register with the SEC and the state regulators, pass an examination and keep certain records. However, they should not, for example, be required to maintain minimum net capital or submit traditional financial reports or audited financial statements or have to maintain substantially all of the compliance infrastructure required of a full-service brokerage firm.

FINRA has developed the concept of a "limited corporate finance broker." [23] In Regulatory Notice 14-09, FINRA solicited public comment on a proposed rule set for firms that engage in a limited range of activities, essentially advising companies and private equity funds on capital raising and corporate restructuring. The rule set would not apply to firms that carry or maintain customer accounts, handle customers' funds or securities, accept customers' trading orders, or engage in proprietary trading or market-making. However, the new regime applies only to private offerings to institutional investors and so does not go far enough to be meaningful to small business issuers.

M&A Brokers

In one important area – private company merger and acquisition transactions – the SEC has taken a significant step to address one of the key recommendations made in the ABA Task Force Report. This has been a significant issue for unregistered intermediaries in such transactions since the Supreme Court's 1985 rejection of the "sale of a business" doctrine in *Landreth Timber Co. v. Landreth*[24]. In its decision, the Court held that private merger and acquisition transactions involving the sale of corporate stock are subject to federal securities laws.[25] Therefore, the intermediaries assisting in those transactions fall within the broker-dealer definition and are subject to the registration requirements of the Exchange Act and state blue-sky statutes.

In its January 2014 "M&A Broker" no-action letter, the SEC Staff stated that it would not recommend enforcement action to the Commission under Section 15(a) of the Exchange Act if an individual or firm meeting the definition of an "M&A Broker" were to effect securities transactions in connection with the transfer of ownership of a privately-held company under the

---

[23] FINRA Regulatory Notice 14-09 (February 26, 2014), www.finra.org/notices/14-09. The term "institutional investor" includes registered investment companies, insurance companies, banks, registered broker dealers, registered investment advisers, certain retirement plans, governmental entities, and individual investors and other entities with at least $50 million in assets.
[24] *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985).
[25] The 2009 Small Business Forum Final Report recommended that the SEC "adopt rules, in coordination with state securities regulators, assigning to the states primary regulatory supervision over merger and acquisition intermediaries and business brokers involving the purchase and sale of privately-owned businesses by creating a limited federal registration exemption from broker registration under Section 15 of the Securities Exchange Act." As a companion recommendation, the Report recommended codification of the SEC Staff's no-action letter to *Country Business, Inc.* (Nov. 8, 2006) for an exemption from federal broker-dealer registration in connection with a "small business sale."

terms and conditions described in the letter without registering as a broker-dealer pursuant to Section 15(b) of the Exchange Act. [26]

An *"M&A Broker"* for purposes of the SEC letter is 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 (as defined below) 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. A buyer could actively operate the company through the power to elect executive officers and approve the annual budget or by service as an executive or other executive manager, among other things.

A *"privately-held company"* for purposes of the letter is an operating company that is a going concern (not a "shell" company") that does not have any class of securities registered, or required to be registered, with the Commission under Section 12 of the Exchange Act, or with respect to which the company files, or is required to file, periodic information, documents, or reports under Section 15(d) of the Exchange Act.

In addition, Congress has been considering creating a limited exemption from federal broker-dealer registration for mergers and acquisition intermediaries. [27]

Of course, the SEC M&A Broker no-action letter only addresses the federal law applicable to broker-dealer registration. State action is also required for there to be true relief for intermediaries assisting in the sale of privately-held businesses. In April 2015, NASAA requested additional comments regarding its proposed uniform state model rule regarding the exemption of certain persons from registration as brokers, dealers agents and/or broker-dealers pursuant to state securities laws. [28] The comment period on the NASAA proposal expired on May 17, 2015.

<u>The Path Forward</u>

The ABA Task Force Report has laid out an approach that has generated much dialogue and garnered much support. The 2006 Small Business Advisory Committee and more than a decade of Small Business Forum recommendations attest to the importance of the issue of addressing the regulation requirements for finders and private placement brokers. More than one approach is possible along the spectrum from full exemption to regulation as broker/dealers. Whatever path is chosen, the rules should be transparent, proportional to the needs and risks presented, and capable of implementation. To both enhance capital formation and protect

[26] M&A Broker Letter from the Division of Market Regulation (January 31, 2014 [revised February 4, 2014]), www.sec.gov/divisions/marketreg/mr-noaction/2014/ma-brokers-013114.pdf.

[27] Recent bills include S.B. 1923 and H.R. 686. S.B. 1923 is identical to H.R. 2274, which was unanimously passed by the U.S. House Committee on Financial Services (57-0) and the full U.S. House (422-0), both on recorded votes in 2014. Two weeks after passage of H.R. 2274 by the House, the SEC Staff issued the M&A Broker no-action letter.

[28] http://www.nasaa.org/35234/notice-of-request-for-additional-comments-regarding-a-proposed-nasaa-model-rule-exemption-certain-merger-and-acquistion-brokers-from-state-registration/. NASAA issued its first request for comments in January 2015.

investors, the rules must be enforced. As a practical matter, while the SEC can lead the effort, the cooperation of FINRA and NASAA is critical to success.

As we further explore ways of resolving the issues discussed in this paper, consideration of the following markers and some initial suggestions may assist in the endeavor:

- Definition and segmentation of the covered persons
    - Identify the types of persons who participate in finder and other intermediary activities
    - Differentiate among those classes of persons – *e.g.*
        - Finders – referrals and introductions only
        - Advisors – more expansive internal activities
        - Intermediaries – limited pre-selling
    - Regulation should scaled according to the class of participants
- Limitation on permissible activities
    - For each covered class, provide appropriate limitations on the activities conducted
- Threshold Restrictions
    - No handling of customer funds or securities
    - Sales can only be made in private placements, not public offerings
    - Purchasers in facilitated transactions must be accredited investors
- Disqualifications
    - Appropriate bad actor disqualifications
    - Not available for intermediary (and, if an entity, its officers, directors and participating employees) that (i) has been barred from association with a broker dealer by the SEC, any state or any self-regulatory organization; or (ii) is suspended from association with a broker-dealer
    - No disqualification or other sanctions for failure to register as a broker prior to effective date of the new rules
- Regulation and reporting
    - No-action letter approach
    - Self-executing status - similar to Investment Advisors Act solicitors rule
    - Registration – similar to Dodd-Frank Act reporting by exempt advisors
    - Membership in FINRA or another self-regulatory organization
    - Written disclosure requirements
        - identity of the intermediary
        - that the intermediary represents the issuer and not the investor
        - relationship, including any affiliation, between intermediary and issuer
        - compensation arrangements, including nature and amount of payments
    - Continuing applicability of other provisions, including the anti-fraud provisions, of the federal and state securities laws
- Other issues
    - Dollar thresholds on amount raised in any transaction
    - Limit on number of transactions on an annual basis
    - Ongoing reporting requirements
    - Examinations (routine, for cause)
    - Fee-sharing with registered broker-dealers

- Technical FINRA requirements relating to “recommendations,” “know your customer” and “suitability”

Even a small step forward would pay benefits to small and growing businesses in terms of providing greater access to capital with which they can expand and create new jobs. The ability to employ finders (those who provide names of or introductions to prospective investors) would certainly be beneficial. However, as a practical matter, the ability to pay transaction-based compensation for mere solicitation would, in most cases, be of only limited utility. The benefits could be significantly greater if the intermediary were able to be more actively involved in the discussions, negotiations and structuring of a private financing.

Creation of a workable system of registration and regulation that is appropriate for the limited activities of intermediaries in private financings would benefit issuers, investors and the economy. The private placement broker proposal is decades old, and the issues are well-known. To achieve success, leadership by the Securities and Exchange Commission, and the cooperation of FINRA and NASAA is critical, and necessary.