



Kirchoff Peterson, Ltd.

ES/36504

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

November 1, 2010

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

Dear Ms. Schapiro:

I support the letter (attached) of Jonathan M. (Mike) Miller dated October 19, 2009, and the MEMO of attorney John C. Willems to the TABB, Inc. Board of Directors dated August 11<sup>th</sup>, 2009 advocating for a securities registration/licensing exemption for main street business brokers. Further, I support the Securities Transfer Exemption Parameters that were attached to Mr. Miller's letter and are also attached to this letter.

Please help small business owners and buyers by formulating a rule adopting the attached Securities Transfer Exemption Parameters for Main Street Business Brokers.

Sincerely yours,

Don Kirchoff, President

Enclosures

CC: Kathleen L. Casey  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Elisse B. Walter  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Luis A. Aquilar  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Troy A. Paredes  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549



Office: 281-335-1200

Fax: 281-335-1246

E-mail: [donk@kpcompany.com](mailto:donk@kpcompany.com)

Website: [www.kpccompany.com](http://www.kpccompany.com)

Business Brokers Network



**TABB, INC.**  
**TEXAS ASSOCIATION  
OF BUSINESS BROKERS**



October 19, 2009

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

## **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.