

1.D. Business Brokers

1.D.1 Q: What is a "business broker" under Texas securities laws? Who needs a business broker license?

A: A business broker is a type of securities dealer that is restricted to a narrow scope of securities-related activities. A business broker is a person (including an individual or a company) whose securities activities are restricted to acting as a broker between principals for the sale of a majority of the stock or equity securities of a privately held business pursuant to a privately negotiated purchase agreement, where the managerial control of the business will devolve upon the purchaser(s) and where compensation received by the business broker will be payable for the brokerage activities only. Any individual or entity that performs these activities must be registered with the Securities Commissioner as a dealer, or agent of a dealer, before acting as a business broker. See Section 12 of the Act.

1.D.2 Q: When a sale of a business is accomplished by a sale of the assets of the business rather than through a stock or other securities sale, is registration as a business broker required?

A: No. The registration provisions of the Act only apply when a sale is made or proposed to be made through the sale of securities.

1.D.3 Q: Are there any situations where a business broker can offer the sale of a small business on a stock basis without violating the Act or Board Rules?

A: Registration is required regardless of the size of the business that is being brokered when it is offered or sold through the transfer of stock or other equity securities.

1.D.4 Q: What is the cost of a business broker dealer license?

A: The filing of an original application is \$275. A registration is effective through December 31 of the year it is granted. A registration must be renewed annually for a fee of \$270.

If the business broker applicant is a legal entity (corporation, partnership or LLC, for example) the entity must also apply to register a designated officer via Form U-4. The application fee for registration of a designated officer is \$285 for the initial application and \$275 for each annual renewal.

If a business broker conducts securities-related activities through an agent, the agent must be registered. An agent application fee is \$285 and it must be renewed annually. The agent renewal fee is \$275.

1.D.5 Q: What form does a business broker use to register its "main office" with the Texas Securities Commissioner?

A: Form BD is used to register a company or sole proprietor as a business broker. Form BD will identify the principal place of business of the broker. If the business broker conducts securities-related activities at another location C in addition to the principal place of business C the other location(s) must be registered as a "branch office" of the broker. The fee for registration of a branch office is \$25. Form BR is used to register a branch office.

1.D.6 Q: What form does an individual business broker use to register himself/herself?

A: Form BD. If an agent of a sole proprietor business broker is required to register, Form U-4 is used. See Rule 115.2(a).

1.D.7 Q: If a company registers with the Texas Securities Commissioner, does each agent

have to register also?

A: If a broker conducts activities as a business broker through agents, each of the agents must be registered.

1.D.8 Q: Once an application for a business broker license is submitted, what is the usual turnaround time for approval or response by the Registration Division?

A: Within 14 days after receipt of an application and appropriate registration fees, the Registration Division will send a letter setting forth a list of items or exhibits that either have not been filed or that contain errors or omissions. Within 14 days of receipt of requested items or exhibits, the staff will review the application and the applicant's responses and make a recommendation to grant, deny, or allow withdrawal of the application. See Rule 104.5.

If the application is complete upon filing and there are no deficiencies, the Registration Staff may make its recommendation within 14 days after receipt of the application.

1.D.9 Q: What are the filing requirements for obtaining a business broker license?

A: The applicant should submit:

- Form BD;
- Form U-4 for the designated officer if the applicant is a legal entity;
- A copy of articles of incorporation, partnership agreement, articles of association, trust agreement, or other documents which indicate the form of organization, certified by the appropriate jurisdiction or by an officer or partner of the applicant (unless the applicant is a sole proprietor);
- A balance sheet prepared in accordance with GAAP reflecting the financial condition of the business broker as of a date not more than 90 days prior to the date of such filing, as well as a certification of balance sheet form;
- Any other information deemed necessary by the Texas Securities Commissioner to determine the business broker's or agent's business repute or qualifications; and
- The appropriate fee(s). See Rule 115.2.

If a business broker has multiple offices where securities transactions will take place, each branch office must be registered using a Form BR. The fee for registration of a branch office is \$25.

1.D.10 Q: Is a business broker applicant required to pass a securities examination?

A: No. Rule 115.3(c)(2)(D) provides a full waiver of examination requirements.

1.D.11 Q: What does a business broker license cover?

A: The restricted activities described in FAQ 1.D.1.

1.D.12 Q: What type of transactions does a business broker license cover (i.e., size, scope, etc.)?

A: A registration is restricted to business brokerage activities, but there is no limitation as to the size of a transaction or the size of a business broker's operational structure. For example, where a business broker has multiple agents acting under the dealer's license, the number of agents is not restricted but each agent must register by filing a Form U-4 and the appropriate fee.

1.D.13 Q: Since business brokers do not hold money or securities, is there a bonding or minimum capital requirement for business brokers?

A: No, but an applicant must demonstrate that it is solvent by filing a balance sheet, as

described in FAQ 1.D.9.

1.D.14 Q: What are the possible penalties if a broker does not have a business broker license and he/she participates in a business brokerage securities transaction, or collects a fee in such a transaction?

A: If an unregistered person sells or offers securities for sale at a time when the person should be registered, the person could be subject to administrative, civil or criminal action.

1.D.15 Q: When a properly licensed business broker is involved in a sale of business through a stock sale, what can that broker actually do?

A: A business broker can only act as a broker between principals in the scope of a privately negotiated purchase agreement.

1.D.16 Q: When a properly licensed business broker is involved in a sale of business through a stock sale, what are some of the things that a broker should not do?

A: An exhaustive list is not possible, but in general a business broker should not participate in a fraud, material omission or misrepresentation, or a scheme to evade registration in relation to an offer for sale or sale of securities.

1.D.17 Q: Can a properly licensed business broker participate in the valuation of a company that will sell via a stock sale?

A: The answer depends upon the circumstances and, in particular, the terms of a privately negotiated purchase agreement.

1.D.18 Q: What if the sale started out as an asset sale and the broker did the valuation for the asset sale?

A: If it is not part of a scheme to evade registration, registration as a business broker is not triggered until the transaction evolves into a purchase of the business via a majority of the stock or equity capital. It should be noted that asset sales can quickly become securities transactions and the broker must be registered at the time of the transaction. Therefore, a business broker who is likely to be involved with a purchase that will be accomplished through a securities transaction should be registered beforehand. Refer to FAQ 1.D.8, regarding the time required to review an application.

1.D.19 Q: When a properly licensed business broker is involved in a sale of business through a stock sale, can he/she pay a finder=s fee?

A: The business broker should not pay a fee to a person who is not registered as the broker=s agent, an agent of a general securities dealer, or as a finder, unless a specific exemption is available under the Act or Board rules. (Note: Exemptions are fact-specific so you should consult legal counsel or the General Counsel of Texas State Securities Board before relying on an exemption.)

A "finder" is an individual who receives compensation for introducing an accredited investor to an issuer or an issuer to an accredited investor solely for the purpose of a potential investment in the securities of the issuer, but does not participate in negotiating any of the terms of an investment and does not give advice to any such parties regarding the advantages or disadvantages of entering into an investment.

A finder must be registered and conduct his/her activities in accordance with Rule 115.11. The amount or structure of a finder=s fee is not restricted, but the role a finder may play in a transaction is restricted as described above and in FAQ 1.C.

1.D.20 Q: When a properly licensed business broker is involved in a sale of business through a stock sale, can he/she receive referral fees from lenders, valuation experts or other entities involved in the transaction?

A: In relation to a sale of business through a stock sale a business broker can be compensated for the brokerage activities only.

1.D.21 Q: Must a business broker's securities related business be housed separately from non-regulated business activities?

A: No. However, a business broker that operates on the premises of another non-securities-related business should be careful to segregate the records of the business brokerage activities or it is possible that an inspection of the office could bring the other records under review, especially if the records of the other operation are commingled with those that are securities-related. See Rule 115.5(e)(9).

1.D.22 Q: Is there a prohibition on advertising that a broker holds a securities license? What can a business broker say regarding registration with the Texas Securities Commissioner? Must the license be displayed on the wall of a business broker's office?

A: It is unlawful for a business broker to use the fact of its registration by public display or advertisement. For example, a business broker may not maintain a marquee, letterhead or business cards stating that AABC Business Broker is registered with the Texas State Securities Board. "There is no prohibition on advertising that a broker is "registered," but the fact of registration can not be tied to the Texas State Securities Board or the Texas Securities Commissioner. See Section 20 of the Act.

Pursuant to Section 21 of the Act, immediately upon receipt of a registration certificate, the business broker shall post the certificate and at all times it is to be conspicuously displayed in the broker's principal place of business and, likewise, a certificate must be posted in each registered branch office located within this state. See Rule 115.2(c) relating to Form BR for each branch office.

1.D.23 Q: Can a registered business broker include its securities dealer license number in advertising related to business brokerage activities?

A: No. As stated above, a business broker is prohibited from using the fact of its registration in advertising. The prohibition includes the public display or advertisement of the license number issued by the Texas State Securities Board.

1.D.24 Q: Can a business broker bring a civil suit to collect a commission or compensation for securities-related activities?

A: Section 34 of the Act provides that no person shall bring any action in court for collection of a commission or compensation for services rendered in the sale or purchase of securities without alleging and proving that such person was duly registered under the Act.

1.D.25 Q: Must securities transaction records be maintained within the same division/company as the records of sale-of-asset transactions or must they be segregated?

A: It is best to segregate stock transaction records from sale-of-asset transaction records. See FAQ 1.D.21.

1.D.26 Q: A policy and procedures manual is required of a registered dealer who has agents. Does a sole practitioner who has no agents or affiliates working for him/her have to have a policy and procedures manual?

A: Pursuant to Rule 115.10, a written supervisory system is required when a broker has agents. The rule does not require such written procedures when the dealer does not have agents, but it generally considered a best practice to establish written procedures in order to ensure that records relating to business brokerage activities are properly created and preserved.