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Law Alert

To: Firm Clients and Contacts
From: Niesar & Vestal LLP
Date: August 23, 2012
Re: **Sale of Business Transactions in California: What License is Required for an Intermediary?**

There are three principal types of merger and acquisition transactions: A) sale of all assets of the business; B) sale of all ownership interests (stock or LLC interests); and C) merger or other statutory reorganization.

A. Sale of Assets:

A sale of all the assets of a business is not a securities transaction. Therefore, no securities broker/agent license is required by California or by the SEC. However, California does require that the intermediary have a Real Estate License as the sale of all or substantially all assets of a business is the sale of a "Business Opportunity" [B&P Code Section 10030]. To be a broker (receive a commission) for the purchase or sale of a Business Opportunity in California one must have a Department of Real Estate (DRE)-issued Real Estate License [B&P Section 10131(a) says that dealing in Business Opportunities is acting as a real estate broker; Section 10130 requires a person engaged in the business of a real estate broker/agent to have a DRE license; Section 10139 says that acting as a real estate broker without a license is a crime.]

What happens if a Real Estate licensed person lists a business for sale as a sale of assets, but before the transaction closes the attorney or accountant for the seller or buyer says the transaction should shift to be a stock (or LLC interest) sale? A properly licensed real estate professional is protected in this event as the transaction will be exempt from the securities broker/agent license provisions by virtue of Department of Corporations Regulation Section 260.204.1(a) which exempts:

“Transactions involving all of the outstanding securities of an existing business if the transactions have been negotiated as transactions for the purchase or sale of real estate or substantially all of the assets of the existing business, or both, but excluding those transactions involving a merger, consolidation, or other reorganization.” (But, if the transaction has migrated to a merger, or other statutory reorganization, the exemption does not apply.)

NOTE: A person licensed as a securities broker/agent may deal in Business Opportunities without a separate Real Estate License unless the substance of the transaction is a disguised sale of pure real estate. [B&P Code Section 10008.5]

B. Sale of All Ownership Interests—either Stock or LLC Interests.

In a sale of all ownership interests the intermediary probably is required to be licensed as a securities broker or agent. The only exception under both SEC and California would be for the rare individual who could qualify as a Finder—i.e., someone who merely makes an introduction, does not participate in negotiations, and does not perform such services for more than one or two entities in a very long period of time. Presumably the Finder will be getting transaction-based compensation, which raises perhaps a rebuttable presumption that the person is not a true Finder and should be registered as a securities professional. However, in exceptional cases getting a transaction-based fee is not fatal to the ability to show that one is a true Finder.

There is no exception from the securities broker/agent registration requirements on the theory that what is being sold is a “business” and not “securities”. That notion, to the extent it had any viability, was put to rest by the U.S. Supreme Court in the *Landreth* case, 471 U.S. 681 (1985), when the Supreme Court said that, even though the entire business was being sold, it was being sold by the sale of all of its stock and stocks are securities, so the securities laws apply.

C. Mergers/Reorganizations.

These transactions involve the transubstantiation of one security into another security or, in the case of a “cash out” merger, the disposition of securities in the target entity for cash. No matter how structured, the transactions involve securities. Hence, an intermediary who is involved, and expects to receive compensation for his or her services, must have a securities license. The same “Finder” exception will, in rare cases, be available.

A Sad Postscript. *Salazar v. Interland, Inc.*, 152 Cal. App. 4th 1031 (2nd Dist. 2007) illustrates the heartbreak that can result from ignorance of the law. Salazar had a contract with HostPro/Interland to represent that entity in its acquisition of AT&T’s web-hosting services for small to medium sized businesses. This was a business unit within AT&T, not a separate subsidiary or division, and it accounted for less than two percent of AT&T’s web-hosting business. Salazar assisted HostPro according to the contract, the acquisition was a success, Salazar was not paid, and Salazar sued for “in excess of \$20 Million”. The Court held that this aspect of AT&T’s business was a separate “business”, hence what was in play was a “business

opportunity”. Salazar did not have a Real Estate License, and he still does not have his \$20 Million.

If you would like to speak with a Niesar & Vestal attorney about any matter discussed in this law alert, please contact Gerald Niesar (gniesar@nvlawllp.com), Oscar Escobar (oescoar@nvlawllp.com), or June Lin (jlin@nvlawllp.com).