

**NEBRASKA DEPARTMENT OF BANKING AND FINANCE
BUREAU OF SECURITIES**

INTERPRETATIVE OPINION NO. 19: – MERGER & ACQUISITION BROKERS

This Interpretative Opinion discusses Merger & Acquisition Brokers (“M&A Brokers”) in the context of the definition of a broker-dealer.

Section 8-1101(2) of the Securities Act of Nebraska (“Act”) defines broker-dealer as “any person engaged in the business of effecting transactions in securities for the account of others or for his or her own account.”

For purposes of this opinion, an “M&A Broker” 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.

For purposes of this opinion, a “privately-held company” is a company that does not have any class of securities registered, or required to be registered, with the Securities and Exchange Commission under Section 12 of the Securities Exchange Act of 1934 (“1934 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 1934 Act. Any privately-held company that is the subject of this letter would be an operating company that is a going concern and not a shell company.

For purposes of this opinion, a “shell company” is a company that: (1) has no or nominal operations; and (2) has: (i) no or nominal assets; (ii) assets consisting solely of cash and cash equivalents; or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets. In this context, a “going concern” need not be profitable, and could even be emerging from bankruptcy, so long as it has actually been conducting business, including soliciting or effecting business transactions or engaging in research and development activities.

For purposes of this opinion, the term “business combination related shell company” means a shell company that is: (1) formed by an entity that is not a shell company solely for the purpose of changing the corporate domicile of that entity solely within the United States; or (2) formed by an entity that is not a shell company solely for the purpose of completing a business combination transaction (as defined in Rule 165(f) of the Securities Act of 1933 (“1933 Act”)) among one or more entities other than the shell company, none of which is a shell company.

The Department has determined that M&A Brokers that facilitate mergers, acquisitions, business sales, and business combinations (together, “M&A Transactions”) between sellers and buyers of privately-held companies, are not within the definition of a broker-dealer under the following conditions:

1. The M&A Broker will not have the ability to bind a party to an M&A Transaction.
2. An M&A Broker will not directly, or indirectly through any of its affiliates, provide financing for an M&A Transaction. An M&A Broker that assists purchasers to obtain financing from

unaffiliated third parties must comply with all applicable legal requirements, including, as applicable, federal Regulation T (12 CFR 220 *et seq.*), and must disclose any compensation in writing to the client.

3. Under no circumstances will an M&A Broker have custody, control, or possession of, or otherwise, handle funds or securities issued or exchanged in connection with an M&A Transaction or other securities transaction for the account of others.
4. No M&A Transaction will involve a public offering. Any offering or sale of securities must be conducted in compliance with an application exemption from registration under the Act and 1933 Act. No party to any M&A Transaction will be a shell company, other than a business combination related shell company.
5. To the extent an M&A Broker represents both buyers and sellers, it will provide clear written disclosure as to the parties it represents and obtain written consent from both parties to the joint representation.
6. An M&A Broker will facilitate an M&A Transaction with a group of buyers only if the group is formed without the assistance of the M&A Broker.
7. The buyer, or group of buyers, in any M&A Transaction will, upon completion of the M&A Transaction, control and actively operate the company or the business conducted with the assets of the business. A buyer, or group of buyers collectively, would have the necessary control if it has the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. The necessary control will be presumed to exist if, upon completion of the transaction, the buyer or group of buyers has the right to vote 25% or more of a class of voting securities; has the power to sell or direct the sale of 25% or more of a class of voting securities; or in the case of a partnership or limited liability company, has the right to receive upon dissolution or has contributed 25% or more of the capital. In addition, the buyer, or group of buyers, must actively operate the company or the business conducted with the assets of the company.
8. No M&A Transaction will result in the transfer of interests to a passive buyer or group of passive buyers.
9. Any securities received by the buyer or M&A Broker in an M&A Transaction will be restricted securities within the meaning of Rule 144(a)(3) under the 1933 Act because the securities would have been issued in a transaction not involving a public offering.
10. The M&A Broker (and, if the M&A Broker is an entity, each officer, director or employee of the M&A Broker): (i) has not been barred from association with a broker-dealer by the Commission, any state or any self-regulatory organization; and (ii) is not suspended from association with a broker-dealer.

This opinion is limited to the definition of the broker-dealer contained in Section 8-1101(2) of the Act and the corresponding requirements to register contained in Section 8-1103. Other provisions of the Act, including, but not limited to, the anti-fraud provisions in Section 8-1102, continue to apply.

Questions regarding this opinion should be addressed to:

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