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# *Chapter 2*

# What Is a Broker-Dealer?

**Robert Colby**

*Chief Legal Officer, Financial Industry Regulatory Authority, Inc.*

**Lanny A. Schwartz**

*Retired Partner, Davis Polk & Wardwell LLP*

**Zachary J. Zweihorn***

*Partner, Davis Polk & Wardwell LLP*

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## § 2:1 Exchange Act Registration Requirement

### *§ 2:1.1 Section 15*

A central element of the investor protection scheme established by the federal securities laws is the comprehensive framework for the registration and regulation of persons engaged in the business of buying and selling securities.

The Securities Exchange Act of 1934 (the "Exchange Act") is the primary federal legislation governing "brokers" and "dealers" in securities.[1] With certain exceptions, section 15 of the Exchange Act

1. As discussed below, the Exchange Act defines a "broker" and a "dealer" differently. However, most rules do not distinguish between a "broker"



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requires registration with the Securities and Exchange Commission (SEC) of all broker-dealers using interstate commerce or the facilities of any national securities exchange to effect transactions in securities (other than exempted securities[2] and certain short-term debt instruments). The Exchange Act, rules of the SEC thereunder, and the rules of self-regulatory organizations (SROs) prescribe an extensive scheme of regulation for broker-dealers. Certain Exchange Act provisions and implementing rules apply to all broker-dealers, whether or not registered, whereas others only apply to those registered with the SEC ("Registered Broker-Dealers").

Section 15, as originally enacted in 1934 ("Original Section 15"),[3] did not impose specific registration requirements on broker-dealers. Instead, Original Section 15 delegated to the SEC the authority to prescribe rules regulating over-the-counter (OTC) transactions.[4] Under this authority, the SEC promulgated rules requiring the registration of all broker-dealers involved in OTC transactions. Regulation of transactions on national securities exchanges was mostly conducted by registered exchanges pursuant to their internal rules. In 1936, Congress codified the broker-dealer registration rules promulgated by the SEC.[5] Section 15, however, initially excluded broker-dealers who traded exclusively on national securities exchanges. As a result, various classes of exchange members, such as specialists, floor traders, and so-called $2 brokers, all of whom performed vital roles for the

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or a "dealer" in their application. In the rest of this chapter, the term "broker-dealer" will be used unless there is a need to distinguish between a "broker" and a "dealer."

2. Exchange Act § 3(a)(12) defines "exempted security" to include: (i) government securities; (ii) municipal securities; (iii) interest in a common trust fund that is not an investment company under section 3(c)(3) of the Investment Company Act of 1940 (the "Investment Company Act"); (iv) interest in a single or collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company in connection with a qualified plan; (v) a security issued by any pooled income fund, collective trust fund, collective investment fund, or similar fund that is not an investment company under section 3(c)(10)(B) of the Investment Company Act; (vi) a security issued in any church plan, company or account that is not an investment company under section 3(c)(14) of the Investment Company Act; and (vii) other securities exempted by the SEC by rules and regulations. However, section 3(a)(12) provides that "municipal securities" are not deemed exempted securities for the purposes of the section 15 registration requirement.
3. Pub. L. No. 73-291, 48 Stat. 881 (1934).
4. Original Section 15.
5. *See* Exchange Act § 15(a), (b), and (c), enacted by Pub. L. No. 621, 49 Stat. 1375, 1377 (1936).



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market, were not subject to the oversight of the SEC.[6] To strengthen the authority of the SEC as part of a regulatory reform following the paperwork crisis of 1968–1970, Congress passed the Securities Acts Amendments of 1975,[7] which eliminated that exclusion and enacted section 15(a) in its current form.[8]

The underlying policy for the broker-dealer registration requirement and associated regulatory framework is to provide important safeguards to investors.[9] The Exchange Act's regulatory scheme is designed to ensure that all Registered Broker-Dealers and their associated persons satisfy professional standards, have adequate capital, treat their customers fairly, and provide adequate disclosures to investors.[10]

Section 15(a)(1) compels registration of most broker-dealers by prohibiting the use by any broker or dealer of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered with the SEC in accordance with the Exchange Act.[11] The registration requirement extends not just to entities, but also to natural persons (other than natural persons who are associated with a broker-dealer).[12]

Sections 2:2 and 2:3 below discuss the definitions of "broker" and "dealer," respectively.

Section 2:4 below discusses the definition of "security" for purposes of the Exchange Act's registration requirements, and section 2:5 discusses "exempted securities."

Section 2:6 explores the extent to which broker-dealers engaged in purely intrastate activities enjoy an exemption from federal registration requirements, and section 2:7 discusses various other exemptions (including for banks and foreign broker-dealers), and the SEC's exemptive authority with respect to broker-dealer registration generally.

Finally, section 2:8 discusses the possible regulatory enforcement and private investor actions that may be brought against a person who conducts business as, or engages, an unregistered broker-dealer.

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6. *See* H.R. REP. NO. 94-123, 94th Cong., 1st Sess.; H.R. 4111 (1975).
7. Act of June 4, 1975, Pub. L. No. 94-29, 89 Stat. 97.
8. *See* H.R. REP. NO. 94-123, 94th Cong., 1st Sess.; H.R. 4111 (1975).
9. *See* Persons Deemed Not to Be Brokers, SEC Release No. 34-20943 (May 9, 1984) [hereinafter Rule 3a4-1 Proposing Release].
10. *Id.*; Eastside Church of Christ v. Nat'l Plan, Inc., 391 F.2d 357, 382 (5th Cir.), *cert. denied*, 393 U.S. 913 (1968).
11. *See* Exchange Act § 15(a)(1).
12. "Person associated with a broker or dealer" is defined in Exchange Act § 3(a)(18).



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### *§ 2:1.2 Consequences of Registration*

Once registered, a Registered Broker-Dealer is subject to numerous compliance requirements and obligations under the Exchange Act, as well as rules and regulations promulgated thereunder. The compliance requirements include: being subject to investigations,[13] inspections,[14] and disciplinary actions[15] by the SEC; and complying with minimum net capital requirements,[16] customer protection rules,[17] specific recordkeeping, financial compliance, and financial reporting requirements.[18] Registered Broker-Dealers are also subject to the general anti-fraud and anti-manipulation provisions of the federal securities laws and implementing rules, as well as specific anti-fraud requirements.[19] Registered Broker-Dealers must also establish, maintain, and enforce policies and procedures reasonably designed to prevent insider trading,[20] and comply with rules limiting extensions of securities-related credit to customers under certain circumstances.[21] Registered Broker-Dealers are also subject to anti-money laundering regulations[22] and many other requirements and obligations under the securities laws, and the rules and regulations thereunder.[23]

One of the most important requirements for broker-dealers, however, may be the obligation to be a member of an SRO,[24] which

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13. Exchange Act § 21.
14. Exchange Act § 15(b)(2)(C); Rules 15b2-2, 17d-1.
15. Exchange Act § 15(b)(4), (5) and (6).
16. Exchange Act § 15(c)(3); Rules 15c3-1, 15c3-3, and 17a-11.
17. *See* Rules 15c3-3, 15c2-1, and 8c-1.
18. *See* Rules 17a-3, 17a-4, 17a-5, 17a-11, 17h-1T, and 13h-1.
19. *See* Securities Act § 17(a); Exchange Act §§ 9(a), 10(b), and 15(c)(1) and (2). As noted in *infra* section 2:1.3, these requirements also apply to unregistered broker-dealers.
20. Exchange Act § 15(g).
21. *See, e.g.*, Exchange Act § 11(d); Regulation T of the Board of Governors of the Federal Reserve System; FINRA Rule 4210.
22. Broker-dealers have broad obligations under the Bank Secrecy Act (BSA) to guard against money laundering and terrorist financing. *See, e.g.*, Department of the Treasury, Financial Crimes Enforcement Network, Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398 (May 11, 2016). In addition to obligations under the BSA, Rule 17a-8 requires broker-dealers subject to the Currency and Foreign Transactions Reporting Act of 1970 to comply with certain reporting and recordkeeping requirements. SRO rules (*e.g.*, FINRA Rule 3310) also require broker-dealers to establish anti-money laundering compliance programs.
23. Many of these various obligations are set forth in other parts and chapters of this treatise. *See, e.g.*, Part 2 (supervisory requirements), chapter 11 (suitability), Part 6 (trading practices), Part 7 (financial responsibility), among others.
24. Exchange Act § 15(b)(8).



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includes national securities exchanges and registered securities associations. The Financial Industry Regulatory Authority (FINRA)[25] is currently the only registered national securities association. A broker-dealer must join FINRA, unless it:

(i) is a member of a national securities exchange;

(ii) carries no customer accounts; and

(iii) has annual gross income derived from purchases and sales of securities otherwise than on a national securities exchange of which it is a member in an amount no greater than $1,000, subject to certain exceptions.[26]

In addition, the Securities Investor Protection Act of 1970 (codified at 15 U.S.C. § 78aaa through § 78*lll*) requires that a Registered Broker-Dealer become a member of the Securities Investor Protection Corporation (SIPC),[27] with limited exceptions.

Membership in a national securities exchange, FINRA or other self-regulatory organization subjects a broker-dealer to the rules and

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25. FINRA was formed in July 2007 through the merger of the National Association of Securities Dealers, Inc. (NASD) with the member regulation function of the New York Stock Exchange (NYSE).

26. *See* Exchange Act § 15(b)(8) and Rule 15b9-1. The $1,000 gross income limitation does not, however, apply to income derived from transactions for a dealer's own account, either with or through another Registered Broker-Dealer. *See* Rule 15b9-1(b). In 2015, the SEC proposed to narrow this exception in light of the many proprietary trading firms that have relied on the exception to engage in unlimited levels of off-exchange trading without being subject to FINRA membership. The 2015 proposal would have eliminated the de minimis $1,000 income threshold and replaced it with more targeted exemptions from FINRA membership for a dealer that effects transactions off the exchange of which it is a member either (i) solely for the purpose of hedging the risks of its floor-based activities, or (ii) as a result of orders that are routed by an exchange to prevent trade-throughs on the exchange, consistent with the provisions of Rule 611 of Regulation NMS. *See* Exemption for Certain Exchange Members, SEC Release No. 34-74581 (Mar. 25, 2015). In 2022, the SEC re-proposed the 2015 amendments to Rule 15b9-1. The 2022 proposal is substantially similar to the 2015 proposal, but (i) does not include the exception for hedging risks of floor-based activities and (ii) takes the view that "off exchange" activities include transacting in OTC equity securities and U.S. Treasury securities. Exemption for Certain Exchange Members, SEC Release No. 34-95388 (July 29, 2022). No further action has yet been taken on this proposal.

27. SIPC was created under the Securities Investor Protection Act of 1970 and it administers a fund that provides insurance for brokerage firm customers against losses arising out of financial failures of brokerage firms.



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requirements of that organization,[28] including, among others, qualification and training standards for natural persons considered to be "associated persons" of the broker-dealer.[29] FINRA and national securities exchanges also have enforcement powers and examination authority over their members and their members' associated persons.

### *§ 2:1.3 Application of Certain Rules to Broker-Dealers Even If Not Registered*

Regardless of whether a broker-dealer is required to register, it is still subject to the fraud, manipulation, and insider trading prohibitions[30] under the federal securities laws, if it transacts in securities.[31] Section 17(a) of the Securities Act of 1933 (the "Securities Act") prohibits any person from committing fraud in securities transactions.[32] Exchange Act § 9(a) makes it unlawful for any person to engage in market manipulation practices or make false or misleading statements to induce securities transactions.[33] Exchange Act § 10(b) outlaws the use of any manipulative or deceptive device or contrivance

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28. Although a broker-dealer that is a FINRA member must generally comply with all applicable FINRA rules, FINRA has established a limited membership category that would be available to broker-dealers engaged solely in certain corporate financing advisory and capital raising activities, referred to as "capital acquisition brokers" or "CABs." A firm that engages only in these limited activities may elect to be regulated as a CAB, subject to a reduced and streamlined set of FINRA rules. *See* Order Approving Rule Change as modified by Amendment Nos. 1 and 2 to Adopt FINRA Capital Acquisition Broker Rules, SEC Release No. 34-78617 (Aug. 18, 2016).
29. Exchange Act § 15(b)(7); Rule 15b7-1; *see also* SEC, Staff Study on Investment Advisers and Broker-Dealers at 46 (Jan. 2011), http://www.sec.gov/news/studies/2011/913studyfinal.pdf [hereinafter Study on Investment Advisers and Broker-Dealers].
30. *See* Securities Act § 17(a); Exchange Act §§ 9(a), 10(b), and 15(c)(1) and (2).
31. *See* SEC v. Clean Care Tech., Inc., 08 CIV 01719 (S.D.N.Y. Feb. 21, 2008); SEC v. Braintree Energy, Inc., No. 100:07-cv-10307 (D. Mass. Feb. 21, 2007); SEC v. Corp. Relations Grp., Inc., No. 99-1222-CV-22-A (M.D. Fla. Sept. 27, 1999); SEC v. Staples, No. 98-1061-CV-22c (M.D. Fla. Sept. 24, 1998); Vorys, Sater, Seymour and Pease, SEC No-Action Letter (Sept. 3, 1991); Registration Requirements for Foreign Broker-Dealers, SEC Release No. 34-27017 (July 11, 1989) [hereinafter Rule 15a-6 Adopting Release]; Letter from Kenneth S. Spirer, Special Counsel, SEC, to Robert J. Delambo, Supervisor of Registrations, Ohio Division of Securities, Department of Commerce (Sept. 27, 1973).
32. Securities Act § 17(a).
33. Exchange Act § 9(a).



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in securities transactions.[34] Exchange Act § 15(c) prohibits all broker-dealers, including municipal securities dealers and government securities broker-dealers, from engaging in or inducing transactions of securities by means of any manipulative, deceptive, or other fraudulent device or contrivance, or fictitious quotations.[35] Exchange Act § 15(c)(7) makes it unlawful for government securities broker-dealers, and bidders for or purchasers of securities, from knowingly or willfully making any false or misleading written statement in connection with certain transactions in government securities.[36]

### *§ 2:1.4 State Registration Requirements*

In addition to the federal regulatory system, broker-dealers are subject to state securities laws, known as the "Blue Sky Laws."[37]

Most states have adopted either the Uniform Securities Act of 1956 (the "1956 Act") or the Uniform Securities Act of 2002 (the "2002 Act"). Both the 1956 Act and 2002 Act make it unlawful for any person to transact business in a state as a broker-dealer or agent[38]

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34. *See* Exchange Act § 10(b). Certain of the SEC's rules under § 10(b) also apply to "any person," such as Rules 10b-5 and 10b-21.
35. Exchange Act § 15(c).
36. Exchange Act § 15(c)(7).
37. The state laws were given the name "Blue Sky Laws" to indicate the evil at which they were aimed, that is, speculative schemes which have no more basis than so many feet of "blue sky." *See* Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917). Many state securities laws were in existence before the enactment of the federal securities laws. *See* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 8.2 (7th ed. 2019); J. Parks Workman, *The South Carolina Uniform Securities Act of 2005: A Balancing Act Under a New Blue Sky*, 57 S.C. L. REV. 409 (2006) (citing HAZEN).
38. "Agent" is defined in the 1956 Act as "any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities." Under the 1956 Act, the term "agent" does not include an individual who represents an issuer in effecting transactions in:
    - any security (including a revenue obligation) issued or guaranteed by the United States, any state, any political subdivision of a state, or any agency or corporate or other instrumentality of one or more of the foregoing; or any certificate of deposit for any of the foregoing;
    - any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency or corporate or other instrumentality of one or more of the foregoing, or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;
    - any security issued by and representing an interest in or a debt of, or guaranteed by, any bank organized under the laws of the United



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unless registered with the state's securities regulatory authority, subject to certain exemptions.[39]

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States, or any bank, savings institution, or trust company organized and supervised under the laws of any state;

- a promissory note, draft, bill of exchange or bankers' acceptance that evidences an obligation to pay cash within nine months after the date of issuance, exclusive of days of grace, is issued in denominations of at least $50,000, and receives a rating in one of the three highest rating categories from a nationally recognized statistical rating organization; or a renewal of such an obligation that is likewise limited, or a guarantee of such an obligation or of a renewal; and
- any investment contract issued in connection with an employee's stock purchase, savings, pension, profit-sharing, or similar benefit plan if the Administrator is notified in writing 30 days before the inception of the plan or, with respect to plans which are in effect on the effective date of this act, within 60 days thereafter (or within 30 days before they are reopened if they are closed on the effective date of this act).

In addition, "agent" does not include, among other things, an individual (i) who represents an issuer in effecting transactions exempted by section 402(b), which includes exemptions for private placements, institutional sales and for various categories of "non-issuer" transactions or (ii) effecting transactions with existing employees, partners or directors of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in the state. A partner, officer, or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions, is an agent only if he or she otherwise comes within this definition.

"Agent" is defined in section 102 of the 2002 Act as "an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities. But a partner, officer, or director of a broker-dealer or issuer, or an individual having a similar status or performing similar functions is an agent only if the individual otherwise comes within the term. The term does not include an individual excluded by rule adopted or order issued under this [Act]."

39. *See* 1956 Act § 201; 2002 Act § 401. Section 401 of the 2002 Act provides two exemptions from the registration requirement: (i) a broker-dealer without a place of business in the state does not have to register if its only transactions effected in the state are with certain defined categories of persons; and (ii) a person that deals solely in U.S. government securities and is supervised as a dealer in government securities by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision. In addition, the 2002 Act provides that, pursuant to a rule or order issued under the act, a foreign broker-dealer may be exempt under certain conditions. For examples of state registration requirements, see CAL. CORP. CODE § 25210 (2020); CONN. GEN. STAT. § 36B-6 (2019); FLA. STAT. § 517.12 (2019).



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In the National Securities Markets Improvement Act of 1996 (NSMIA), Congress preempted certain aspects of state regulation of broker-dealer operations.[40] NSMIA added what is now section 15(i) to the Exchange Act, which prohibits states from establishing different or additional rules with respect to capital, custody, margin, financial responsibility, records making and keeping, bonding, or financial or operational reporting requirements for Registered Broker-Dealers.

### *§ 2:1.5 Consequences of Illegally Doing Business As an Unregistered Broker-Dealer*

Absent an exemption, effecting securities transactions without proper registration may subject a broker-dealer to SEC and state enforcement actions as well as private actions for rescission. There are a number of potential adverse consequences of doing business illegally as an unregistered broker-dealer, including:

(i) cease-and-desist orders from the SEC or relevant state regulator or court injunctions;

(ii) civil penalties including fines and disgorgement;

(iii) criminal liabilities;

(iv) potential rescission rights of investors under federal or state law; and

(v) reputational harm.

For a more detailed discussion of these possible adverse consequences, see *infra* section 2:8.

## § 2:2 What Is a Broker?

### *§ 2:2.1 Generally*

Section 3(a)(4)(A) of the Exchange Act defines a "broker" as "any person[41] engaged in the business of effecting transactions in securities for the account of others."[42] The definition focuses on three elements. A broker must:

(i) be "engaged in the business,"

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40. National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (1996).
41. The term "person" means "a natural person, company, government, or political subdivision, agency, or instrumentality of a government." *See* Exchange Act § 3(a)(9).
42. Exchange Act § 3(a)(4)(A).



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(ii) of "effecting transactions in securities,"

(iii) "for the account of others."

These three terms are not defined in the Exchange Act or the SEC rules thereunder. The courts and the SEC have taken an expansive view of the scope of these terms. Often, courts apply a "facts and circumstances" analysis in evaluating whether a person has acted as a broker, with no single element being dispositive.[43]

### *§ 2:2.2 Effecting Transactions*

Courts and the SEC have determined that a person "effects transactions in securities" if the person participates in such transactions "at key points in the chain of distribution."[44] According to the SEC, such participation may include, among other activities:

(i) assisting an issuer to structure prospective securities transactions;

(ii) helping an issuer to identify potential purchasers of securities;[45]

(iii) screening potential participants in a transaction for creditworthiness;

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43. *See, e.g.*, Study on Investment Advisers and Broker-Dealers, *supra* note 29, at 9 (listing examples of brokerage services and products); Maiden Lane Partners, LLC v. Perseus Realty Partners, G.P., II, LLC, No. 09-2521-BLS1, 2011 Mass. Super. LEXIS 86, at *12 (Mass. May 31, 2011); SEC v. Kramer, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011); DeHuff v. Dig. Ally, Inc., No. 3:08CV327TSL-JCS, 2009 U.S. Dist. LEXIS 116328, at *10–11 (S.D. Miss. Dec. 11, 2009).

44. *See* Mass. Fin. Servs., Inc. v. Sec. Inv'r Prot. Corp., 411 F. Supp. 411, 415 (D. Mass.), *aff'd*, 545 F.2d 754 (1st Cir. 1976), *cert. denied*, 431 U.S. 904 (1977); *see also* SEC v. Nat'l Exec. Planners, Ltd., 503 F. Supp. 1066, 1073 (M.D.N.C. 1980); Transfer Online, SEC Denial of No-Action Request (May 3, 2000). Distributions facilitated in an unconventional manner have also been found to give rise to broker-dealer status. *See, e.g.*, *In re* International Capital Grp., LLC, SEC Release No. 34-74172 (Jan. 29, 2015) (instituting proceedings for unregistered broker-dealer activity against person purporting to provide loans against microcap securities collateral, but raising cash for the loan through the sale of the collateral into the market).

45. *See, e.g.*, David W. Blass, Chief Counsel, Division of Trading and Markets, SEC, Remarks to American Bar Association, Trading and Markets Subcommittee (Apr. 5, 2013); *see also* Strengthening the Commission's Requirements Regarding Auditor Independence, SEC Release No. 34-47265, at n.82 (Jan. 28, 2003) (noting that an accounting firm that helps an issuer identify potential purchasers of securities may be "effecting transactions" and acting as a broker).



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(iv) soliciting securities transactions (including advertising);[46]

(v) negotiating between the issuer and the investor;[47]

(vi) making valuations as to the merits of an investment or giving advice;[48]

(vii) taking, routing or matching orders, or facilitating the execution of a securities transaction;[49]

(viii) handling customer funds or securities;[50] and

(ix) preparing and sending transaction confirmations (other than on behalf of a broker-dealer that executes the trades).[51]

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46. *See* SEC v. Margolin, No. 93-7309, 1992 U.S. Dist. LEXIS 14872, at *15–16 (S.D.N.Y. Sept. 30, 1992); *In re* Ireeco, LLC, SEC Release No. 34-75268 (June 23, 2015) (finding firm that solicited foreign nationals to invest in particular project in connection with obtaining an EB-5 visa was an unregistered broker). *See also* Complaint, SEC v. Newman, No. 20-CV-61976 (S.D. Fla. Sept. 29, 2020); Complaint, SEC v. Baquerizo, No. 20-CV-81763 (S.D. Fla. Sept. 29, 2020) (alleging that a scheme involving cold calling senior investors constituted solicitation of investors and therefore unregistered broker activity); *In re* BrixInvest, LLC, SEC Release No. 34-87130 (Sept. 26, 2019) (adviser to real estate investment trusts (REITs) that operated a web platform to publicly market and sell shares in the REITs was operating as an unregistered broker); Proposed Exemptive Order Granting a Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors, SEC Release No. 34-87204 (Oct. 2, 2019) (noting that solicitation is "factor relevant to a determination of broker status," particularly where the solicitor receives transaction-based compensation).
47. *See* SEC v. Martino, 255 F. Supp. 2d 268, 270 (S.D.N.Y. Apr. 2, 2003); SEC v. Hansen, No. 83 Civ. 3692, 1984 U.S. Dist. LEXIS 17835, at *26 (S.D.N.Y. Apr. 6, 1984).
48. *Id*.
49. *In re* Neovest, Inc., SEC Release No. 34-92285 (June 29, 2021) (finding that a company providing technology services that allowed customers to route orders to buy and sell securities, for which it received transaction-based compensation, operated as an unregistered broker-dealer).
50. *See* The Investment Archive, LLC, SEC No-Action Letter (May 14, 2010). Handling customer funds may also include handling customer's digital currencies, such as bitcoin, in connection with bitcoin-denominated securities transactions. *See In re* BTC Trading, Corp., SEC Release No. 34-73783 (Dec. 8, 2014).
51. *See* BondGlobe, Inc., SEC Denial of No-Action Request (Feb. 6, 2001); Progressive Technology Inc., SEC Denial of No-Action Request (Oct. 11, 2000); BD Advantage, Inc., SEC Denial of No-Action Request (Oct. 11, 2000); Transfer Online, SEC Denial of No-Action Request (May 3, 2000); Letter from Catherine McGuire, Chief Counsel, Division of Market Regulation, to Myles C.S. Harrington, President, MuniAuction, Inc. (Mar. 13,



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Not all of the factors are of equal importance, however. Many of these factors are not in themselves sufficient to trigger broker registration, but rather indicate broker activity in conjunction with other criteria, especially compensation. Thus, evaluating the merits of investments and issuing confirmations are relatively weak factors. In contrast, helping an issuer identify potential purchasers, and handling customer funds and securities are moderate factors. In addition, structuring issuances, soliciting transactions negotiating with investors and taking and executing orders are strong indicators of broker activity. Each of these factors is substantially heightened when combined with transaction-based compensation.

### *§ 2:2.3 Clerical and Ministerial Activities*

Some acts of participation, however, will not be deemed "effecting" securities transactions. The SEC has stated that "[i]n our view, the term 'effect' should be construed broadly to encompass not only persons who are engaged directly in the offer or sale of securities, but also those persons who perform other than purely ministerial or clerical functions with respect to securities transactions."[52] That is, a person who conducts activities that go beyond those that are merely clerical or ministerial in nature will be required to register with the SEC as a broker-dealer, unless an exemption is available.[53]

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2000); Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, SEC Release No. 34-44291 (May 11, 2001); SEC v. Hansen, 1984 U.S. Dist. LEXIS 17835 (S.D.N.Y. Apr. 6, 1984); SEC v. Art Intellect, Inc., No. 2:11-CV-357, 3572013 U.S. Dist. LEXIS 32132, at *63 (D. Utah Mar. 6, 2013). Depending on additional circumstances, engaging in certain of these activities could also trigger registration requirements under other regulatory regimes, for example, as an investment adviser under the Investment Advisers Act of 1940 (the "Investment Advisers Act") or as a municipal advisor under the Exchange Act. *See, e.g.*, Registration of Municipal Advisors, SEC Release No. 34-70462 (Sept. 20, 2013). In addition, the SEC or a court may also look to other contexts where the meaning of the term "effecting transactions" has been considered for guidance on the meaning of this term under section 3(a)(4). *See, e.g.*, Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants, SEC Release No. 34-75611 (Aug. 5, 2015) (discussing the meaning of "effecting" transactions in security-based swaps, and citing various authorities interpreting the term "effecting" for purposes of other rules under the Exchange Act).

52. *See* SEC Denial of No-Action Request, Financial Surveys, Inc. (Aug. 29, 1973).

53. *See* Letter from Ezra Weiss, Chief Counsel, Division of Market Regulation, to Harold J. Smotkin, Clearing Service, Inc. (Jan. 3, 1972) (Clearing Service was required to register as broker-dealer, inasmuch as the services



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