

Broker-Dealer: Never Make Registration Decisions Based On Assumptions

Timothy J. Kuhn, Snell & Wilmer L.L.P.



Utah is commonly distinguished as one of the best states for business and ranked in the top ten best states for starting a business. This dynamic creates a favorable business climate that is a draw for out-of-state investors looking for opportunities to infuse capital into Utah businesses. These investors frequently facilitate their search for investment opportunities by engaging a "broker-dealer."

A broker-dealer facilitates the brokering of capital between investors and businesses while often acting as financial advisor to the investors. The broker-dealer typically collects a fee for connecting the investor with a potential strategic business investment or financial transaction.

Generally, for a broker-dealer firm to conduct capital brokering in Utah it must be registered under the federal securities laws and must also comply with the Utah Uniform Securities Act (the "**Act**"), which may include registering with the Utah Division of Securities (the "**Division**"). Like most states, Utah has adopted the Uniform Securities Act. Unlike many states, however, Utah has yet to formally adopt definitions for certain exemptions that would otherwise allow out-of-state "broker-dealers" to operate in Utah without registering with the Division.

In order for an out-of-state broker-dealer to conduct business in Utah, it must either

- be registered with the Division, or
- be registered with another state's securities regulatory authority and comply with the applicable exemptions under the Act that allow an out-of-state broker-dealer to conduct business in Utah without registering with the Division.

Specifically, the Act permits an out-of-state broker-dealer to conduct business in Utah without registering with the Division if the "broker-dealer" (1) has "no place of business in" Utah, and (2) transacts in Utah exclusively with another "financial institution or institutional buyer," whether for itself or another investor. One concern in relying upon this exemption is that neither "financial institution" nor "institutional buyer" are defined in the Act, and neither the Division nor Utah courts have adopted official rules or definitions.

Given the ambiguity that surrounds this exemption, an out-of-state broker-dealer advising an investor in connection with a potential financial transaction in Utah might believe this exemption applies. An example would be an out-of-state broker-dealer connecting an investor with a \$10 million growth fund in Utah. Even though "financial institution" and "institutional buyer" have yet to be defined, the parties to such a transaction may conclude that the Division would follow similar standards to an "accredited investor" test under SEC Rule 501 or Regulation D as defined under the Securities Act.

Many states that have adopted the Uniform Securities Act have applied the "accredited investor" standard as the definition of "institutional buyer" under this exemption. For example, Delaware has formally defined "institutional buyers" for purposes of this registration exemption under its adoption of the Uniform Securities Act to include "accredited investors" as defined in SEC Rule 501. The state of Washington also followed the "accredited investor" approach, defining an "institutional buyer" to mean a corporation, partnership or other entity of not less than \$10 million or entities of sufficient expertise and financial strength to bear the risks of purchasing unregistered securities.

Congruent with Delaware and Washington, there are Utah Division interpretative opinion letters (the "**Opinions**") that have consistently suggested that the "accredited investor" approach is followed when defining whether the "institutional buyer" exemption applies. For example, in one interpretive opinion the Division opines that an "institutional buyer" is considered to have a "heightened amount of knowledge and experience" related to the purchase of securities, "eliminat[ing] the need for state protection by securities registration with respect to its investments in securities." The Division identified three core characteristics, consistent with the requirements for an "accredited investor" under SEC Rule 501 that a "customer" or "business" must demonstrate to qualify as an "institutional buyer" and exempt the broker-dealer from registration with the Division: (1) experience; (2) sophistication; and (3) knowledge related to "investment decisions" and "financial matters." However, without formal Division rules, any such reliance on these Opinions has some element of risk, and may even be dangerous, when considering the ramifications of a potential Division finding that a broker-dealer firm's interpretation of "institutional buyer" is incorrect.

For the time being, an out-of-state broker-dealer should use caution when it attempts to advise an investor or Utah business in connection with a potential business investment or financial transaction in Utah without registering with the Division. Even with the Division's own opinions seemingly congruent with other states who have formally adopted the "accredited investor" standard as the definition of "institutional buyer" under this exemption, capital investors seeking to enter the Utah market using a registered out-of-state broker-dealer should proceed with caution. Out-of-state broker-dealers should consider registering with the Division until such time when the definition of an "institutional buyer" is formally defined in Utah.

Brad W. Merrill and Kenneth C. Ashton, Partners at Snell & Wilmer, contributed to this article.

Timothy J. Kuhn, associate, tkuhn@swlaw.com



Timothy J. Kuhn is an associate in the Salt Lake City, Utah office of Snell & Wilmer L.L.P. His practice is concentrated in business and finance with an emphasis on corporate governance, mergers and acquisitions, private placements, securities law compliance, joint ventures, and general corporate matters.

Full Bio (http://www.swlaw.com/attorneys/timothy_kuhn)

Brad W. Merrill, Partner, bmerrill@swlaw.com



Brad W. Merrill is a partner in the Salt Lake City, Utah office of Snell & Wilmer L.L.P. His practice is concentrated in corporate, banking, business and finance with extensive experience with corporate governance matters, bank regulatory, private placements and other capital raising, mergers and acquisitions, joint ventures and partnerships, asset-based lending financing transactions and general corporate law.

Full Bio (http://www.swlaw.com/attorneys/brad_merrill)

Kenneth C. Ashton, Partner, tkuhn@swlaw.com



Kenneth C. Ashton is a partner in the Salt Lake City, Utah office of Snell & Wilmer L.L.P. He advises start-up, emerging growth and mature companies in a variety of business transactions. He also represents private equity funds, strategic buyers, and commercial and private lenders.

Full Bio (http://www.swlaw.com/attorneys/kenneth_ashton)

Snell & Wilmer L.L.P.

Founded in 1938, **Snell & Wilmer** (www.swlaw.com) is a full-service business law firm with more than 400 attorneys practicing in nine locations throughout the western United States and in Mexico, including Phoenix and Tucson, Arizona; Los Angeles and Orange County, California; Denver, Colorado; Las Vegas and Reno, Nevada; Salt Lake City, Utah; and Los Cabos, Mexico.

As a large, full-service firm, Snell & Wilmer provides the competitive advantage of having the ability to call upon the diverse experience of our attorneys to address the particular and evolving legal issues of any engagement. A team of attorneys and support staff can be easily assembled for large scale projects or emergency situations. To maximize these advantages, Snell & Wilmer attorneys are organized into practice groups. This gives clients easy accessibility to the unique skills and knowledge of each attorney.

Material in this work is for general educational purposes only, and should not be construed as legal advice or legal opinion on any specific facts or circumstances, and reflects personal views of the authors and not necessarily those of their firm or any of its clients. For legal advice, please consult your personal lawyer or other appropriate professional. Reproduced with permission from Snell & Wilmer L.L.P. This work reflects the law at the time of writing in October, 2013.